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# SALMOND'S LAW OF TORTS

A TREATISE ON THE  
ENGLISH LAW OF LIABILITY FOR  
CIVIL INJURIES

TENTH EDITION

BY  
W. T. S. STALLYBRASS, D.C.L.

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DEDICATION OF SIXTH EDITION

[*By the Author*]

TO THE MEMORY OF  
MY SON,  
WILLIAM GUTHRIE SALMOND,  
A CAPTAIN IN THE NEW ZEALAND ARMY,  
WHO IN FRANCE ON THE 9TH DAY OF JULY, 1918,  
GAVE UP HIS LIFE  
IN THE TWENTY-SIXTH YEAR OF HIS AGE.

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DEDICATION OF TENTH EDITION

[*By the Editor*]

IN GRATITUDE TO  
MY PUPILS,  
WHO IN THE TWO WORLD WARS  
OFFERED THEIR LIVES  
TO PRESERVE  
RESPECT FOR THE RIGHTS OF OTHERS  
AND FREEDOM  
UNDER THE COMMON LAW.



## PREFACE TO THE TENTH EDITION

It is now nine years since the last edition of this book appeared. When in August, 1940, I was approached with a view to the preparation of a new edition I had not the heart to undertake the work, nor did the occasion seem suitable. When the invitation was renewed over two years later the time was more than ripe if *Salmond's Torts* was to retain its position with practising lawyers and students. For, though the Legislature had almost ceased from troubling, the law had been developed and enriched by many judgments of first-class importance, the quality of which seemed in no way impaired by the conditions under which our Judges had to carry on their work during the enemy's onslaught on London and Southern England. Moreover, during those nine years two valuable additions had been made to the Law Library, dealing with the subject of this book,\* Dr. Winfield's *Text Book of the Law of Tort* and Dr. Glanville Williams' *Liability for Animals*.

The law of torts is perhaps the most rapidly developing branch of our law. It is not surprising, therefore, that this volume should be largely a new book. When the last edition appeared one extremely kind and too flattering reviewer wrote: "Many of us would have preferred that *Salmond's Torts* had remained in the sixth edition which was the last revised by the author, or that it had been handed over to more pedestrian editorship", whilst asking that the editor should produce an independent study of the subject. In self-defence I must plead that I could never hope to produce a book of my own comparable in merit with that of Sir John Salmond, and that in the first edition which I edited I wrote in the Preface: "fortunately the *ipsissima* and *ultima verba* of the distinguished author are in existence in the sixth edition, and it is my advice to all those who are fortunate enough to be in possession of that work to keep it as a *κτῆμά ἐς αἰῶν*". The principles which have guided me, in gradually transforming

the book may be found in the extracts from earlier prefaces which are printed below.

The same principles have still guided me in preparing the present edition. Any academic editor of a legal textbook must be torn in two directions. He is drawn towards historical investigation on the one hand and on the other towards a teleological approach with suggestions for law reform. But I have tried to remember that *Salmond's Law of Torts* is not primarily a statement of the law as it was or as it should be but a picture of the law as it is to-day. I have tried to resist the temptation—not always resisted by Sir John Salmond himself—to treat special problems in a manner and fullness more suitable for the *Law Quarterly* or the *Modern Law Review*.

Sir John Salmond in the Preface to the First Edition clearly expressed the object he set before himself—to set forth in moderate compass the principles of the Law of Torts with as much precision, coherence and system as the subject admits of and with as much detailed consideration as is necessary to make the work one of practical utility. He wished the book to be useful both to lawyers and students. These aims I have kept before me in preparing the present edition. That the book should be “in moderate compass” was, when all is said and done, an integral part of Sir John Salmond's original design. There is nothing easier than to add fifty pages to each new edition of a textbook. The second edition of Salmond ran to 502 pages, the sixth to 611 and the ninth to 669. I take some credit to myself for the fact that the present edition is reduced to 632 pages, some, but not all, of the reduction being due no doubt to the insertion of the marginal notes in the body of the text. This result has not been achieved without loss. I have severely curtailed Sir John Salmond's treatment of Injuries to Servitudes, which admirable though it was, seemed disproportionately detailed for a student's book on the law of torts. Although some 489 new cases have been added I have omitted only 167, though I have cut down some of the long lists of cases in the footnotes which appeared in earlier editions. I have

preferred modern authorities to old, for the modern authorities refer back to the old and the old cannot refer forward to the new. And I have reduced the lengthy discussions of old cases upon which we were brought up, but which no longer have the same interest or the authority as they had forty years ago, such as *Tarry v. Ashton*, *Baker v. Snell*, *Williams v. Jones* and *Earl v. Lubbock*.

Sir John Salmond desired to set forth the principles of the law with as much precision, coherence and system as possible. In endeavouring to give effect to the accomplishment of this aim I have made some considerable changes with a view to a more logical arrangement of the book. Damage for a shortened expectation of life, nervous shock and pre-natal injuries have been treated as part of the law relating to the measure of damages for trespass to the person, whilst the Fatal Accidents Acts have been dealt with in the chapter on Injuries to Domestic and Contractual Relations. The old chapter on Liability for Dangerous Property has been split up into a chapter on the Liability to Persons Injured on Dangerous Premises, which follows the chapter on Negligence, and chapters on Animals and Dangerous Chattels which are grouped with the other chapters dealing with absolute or strict liability. The defence of inevitable accident is no longer treated as a General Principle, but is dealt with separately under each of the torts to which it is relevant. I have discarded the use of the term quasi-tort and re-distributed Sir John Salmond's rather confusing section on Absolute Liability. I have added short sections on Felons and Bankrupts—two undesirable classes of customer of whom Sir John Salmond steered clear!

Sir John Salmond's ambition that the book should be one of practical utility demands that it should be up-to-date. It must keep abreast not only with the development of the law by our Judges and the Legislature but with the increase of knowledge which we owe to writers. The Limitation Act, 1939, involved the re-writing of those parts of the book which deal with limitations, and I have largely re-cast the section on Animals as a result of the publication of Dr. Glanville Williams'

book on that subject. The decisions of the Courts have involved numerous additions and re-statements, and in the present edition hardly a page remains without change. But it may be useful to point out the major alterations. The chapter on Conspiracy has been almost entirely re-written in the light of the *Crofter Company's Case* in the House of Lords, and decisions in that House and the Court of Appeal have led to considerable alteration in the treatment of Nuisance, the law of Master and Servant (especially the doctrine of common employment), the Waiver of Torts and Defamation.

This edition was first sent to print at the end of January, 1944, but the inevitable difficulties of war-time have delayed its appearance in spite of all the printer's efforts. I believe, however, that proper consideration has been given in the text to all English cases reported up to the end of the year 1944, and I have managed to slip in references to a few cases reported since that date. But one Bill before Parliament and one decision of the Court of Appeal demand special notice here. Lord Simon introduced his Contributory Negligence Bill after this volume was already in print, and it was only possible in the text to give it a word of greeting and the most cursory treatment. It seems desirable, therefore, to add a few words here about a reform which has long been awaited and is very generally approved. Further consideration has not altered the view expressed in the text that the new Bill, in accordance with the recommendation of the Law Revision Committee, leaves unaffected as a matter of law what has been somewhat inaptly called the "last opportunity rule". That Committee recommended that the common law should be brought into line with the Maritime Conventions Act, which provided that in the case of damage caused by the fault of two or more vessels the liability should be in proportion to the degree in which each vessel was in fault.

Sir John Salmond was of opinion that that Act abrogated "the last opportunity rule", but the House of Lords held otherwise in *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* The new Bill applies to damage suffered by the plaintiff "as the result partly of his own fault and

partly as the fault of any other person", and the damages are to be reduced with regard to the claimant's "share in the responsibility for the damage". It would seem that "the result of" in the later enactment is intended to have the same meaning as "caused by" in the earlier. But it is probable that in practice the power to apportion blame will tempt the Court to deal with the question, in the words of Lord Birkenhead, "somewhat broadly and on common-sense principles", and to refrain from too meticulous an analysis in finding the cause of an accident. The result of the Bill will in all probability be that Courts will tend to divide the loss in all cases where some degree of negligence can be attributed to both parties, even though in strictness the accident was wholly caused (at law) by the one who might have avoided the consequences of the other's negligence.

The reports of *Read v. Lyons & Co.* in the Court of Appeal (1945), 172 L. T. 104, also arrived too late for full treatment or mature consideration in the text. The judgments of Scott and du Parcq, L.JJ., in this case are interesting as showing a resurrection of a general principle of no liability without fault. Is it possible that the pendulum is beginning to swing back? (See p. 20.) The speeches in the House of Lords in *Sedleigh-Denfield v. O'Callaghan* may be other straws in the same wind. Should this wind blow hard the sixth edition of *Salmond's Torts* will give a truer picture of the law than the tenth, and Sir John himself will be revenged upon his editor.

The necessity of saving paper has been responsible for one or two changes. The marginal notes have now been inserted in the text in italics. This was done at the last moment and could no doubt have been better done. On the other hand, the relegation of the regnal years and chapters of the Statutes to the Table of Statutes will be welcomed by students. The Table of Cases is (as in previous editions) merely an index and contains no references. To have put in references to collateral reports would have greatly increased the size and cost of the volume, and would have been dangerous, for a collateral report often would not support a proposition for which the case is cited; in these days of paper shortage



reports are more selective, and it is not uncommon for a particular point or sentence to appear in only one report, though none the less authentic.

Errors in past editions have been excised; that new errors have crept in is inevitable, and I am conscious that there is still much room for improvement. But I, myself, am confident that this is the best edition of this work for which I have been responsible. I can only hope that in this at least my judgment is not at fault. If I be right, it is because once again I owe much to the generous and unselfish help which I have received from my friends. For the third time I must express my deep indebtedness to Mr. P. A. Landon, Fellow of Trinity College and Reader in Criminal Law and Evidence at Oxford University, for reading the proofs. A policy of appeasement has met with no success, and in spite of the many matters in which I have gone half way to meet his views there is still a great deal in this volume of which he strongly disapproves. But he has saved me from many errors and the book owes much to his judgment, criticism and vigilant scrutiny. I am not less indebted to Mr. T. H. Tylor, Fellow of Balliol College, who devoted many hours to discussing with me parts of the work whilst it was in manuscript, and who made suggestions on other parts when it was in proof. Not a few of the changes which have been made in this edition are due to his wide and accurate knowledge of case law, and his powers of orderly arrangement and searching analysis of legal concepts. My thanks are due also to Captain A. B. Brown, Fellow of Worcester College, and Lieutenant-Commander C. McFadyean, R.N.V.R., both of whom have read all the proofs and made valuable suggestions which I have adopted. Mr. W. R. Verdon Smith, of the Inner Temple, who helped so much with the last edition, has this time been too heavily involved in the production of aeroplanes to give me the benefit of his advice, but he relieved me from much anxiety by having a photostat taken of the manuscript as an insurance against enemy action. Finally, I must express my thanks and admiration to the printers who, in spite of a manuscript which must in places have been difficult, and in

the face of the manifold difficulties imposed by war conditions, have in no way fallen short of the high standard for which they had built up a reputation. For the Index I am indebted to Mr. C. Walsh; for the Table of Cases I am myself responsible.

When editing previous editions I have been greatly helped by the discussions which I have had with my pupils. Their searching questionings called attention to difficulties and obscurities and helped me to clarify my own mind on the numerous problems which are always arising in the Law of Torts. I have keenly felt the lack of that assistance in preparing this edition. During the last six years my pupils have been engaged on grimmer business. To them I have ventured to dedicate the present volume.'

W. T. S. STALLYBRASS.

BRASENOSE COLLEGE,  
OXFORD.

*March 1, 1945.*

## PREFACE TO THE FIRST EDITION

I HAVE endeavoured in this book to set forth the principles of the law of Torts with as much precision, coherence, and system as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility. No book is justified by the good intent of its author : but I hope that the present work will be found of use to lawyers and to students of law as a general exposition, in moderate compass, of an extensive and in some respects difficult and imperfectly developed department of our legal system.

J. W. S.

WELLINGTON, NEW ZEALAND,  
August 5, 1907.

## FROM THE PREFACE TO THE SIXTH EDITION

FOR the most part the law of Torts is well settled, and such questions as arise relate in general to matters of supplementary detail. There are still, however, some unsolved problems of far-reaching significance, which introduce such elements of uncertainty as to render impossible any complete and confident exposition of the law, and to constrain the writer of a law-book to deal with certain subjects in a manner which is merely provisional and speculative.

The first of those problems relates to the various rules of absolute liability for accidental harm. Had the law been content to adopt the uniform principle that liability for such harm depended in all cases on the existence of negligence on the part of the defendant or his servants, most of the serious difficulties and complexities which now exist as to this matter would have been eliminated. Unfortunately, however, for the simplicity of our legal system, it has been thought necessary to establish a number of exceptions to this general principle; and the question as to the nature and limits of these exceptional rules of absolute liability still remains largely covered with doubt and darkness. This is more especially so with the rule established by the decision of the House of Lords in *Rylands v. Fletcher* in 1866. No decision in the law of Torts has done more to prevent the establishment

of a simple, uniform, and intelligible system of civil responsibility. I have retained unaltered the provisional explanation of this branch of the law which appeared in former editions, though I fully realise the uncertainty of the matter.

Another fundamental question which is still unsettled is that of the true nature of the rule as to contributory negligence. No more baffling and elusive problem exists in the law of Torts. . . . An endeavour to solve the difficulties inherent in this problem leads to the conclusion that the common law rule of contributory negligence is essentially unsound. It seems impossible to establish any satisfactory doctrine whereby, in cases where an accident happens through the combined negligence of two persons, the total liability is nevertheless cast on one or the other of them exclusively according to the circumstances. It would seem that the only satisfactory rule is that which is adopted in the Admiralty jurisdiction, and in those systems which are derived from the Civil Law, namely, that of dividing the loss between the persons who are responsible for it, either equally or in proportion to the degree of their fault.

J. W. S.

WELLINGTON,  
May, 1923.

## FROM THE PREFACE TO THE SEVENTH EDITION.

As this is the first edition of this work for which the late distinguished author is not himself responsible, perhaps rather more is required by way of preface than would otherwise be the case.

The editor of a book by a deceased author of world-wide reputation has to steer between Scylla and Charybdis. It has been recently well said that it is a most common, but nevertheless a most serious, demerit in English legal textbooks of reputation that in the course of time in the hands of successive editors they grow longer and longer by the addition of recent cases, while the older matter is allowed—out of respect for their distinguished authors, or because of what their editors deem to be the limits of their task—to remain as a source of confusion to the reader when it has become out of date and even inaccurate. That is Scylla. On the other hand, there is a temptation for an editor to

substitute his own views for those of the author without distinguishing what is his own. That is Charybdis, for 'he has no ground to expect that his own views will carry the same weight as those of a distinguished author whose opinions have been frequently cited with respect by His Majesty's Judges.

In this difficult navigation I have guided myself by one general principle : that the present edition shall be as good a book as I can make it, whilst never forgetting that it is Sir John Salmond's book and not my own.

W. T. S. S.

OXFORD,  
June 10, 1928.

## FROM THE PREFACE TO THE EIGHTH EDITION

THE preface to this edition must perforce start with a plea of confession and avoidance. It must be confessed that *Salmond's Torts* is now a very different book from that which last was published by the distinguished author himself in 1924. Such extensive alterations in a book which has become almost a classic in less than a quarter of a century need justification. . . .

In no branch of the law has the development during the twentieth century been more marked than in the law relating to the action of negligence. Sir John Salmond was still able in 1924 to deny the existence of any such action and to say that negligence was essentially a subjective fact. He was accordingly able to maintain his fundamental thesis that, with certain exceptions, wrongful intent or negligence was an essential condition of civil liability for tort. . . . In 1934 . . . Sir John Salmond's fundamental thesis is frankly untenable.

Here was a problem even more difficult to solve than that which faced me when I edited the Seventh Edition. Was this edition to present what appeared to me an essentially false picture of the law as it stands to-day? Should I retain the system by which Sir John Salmond's treatment of the subject was preserved in the body of the book and then explain in an Excursus that his views were no longer supportable? Or should I uproot the foundation upon which the author whose work I was merely editing had made his edifice rest?

A book on the Law of Torts is not like a book on Jurisprudence. The value of a book on Jurisprudence lies in the fact that it

expresses the views of its author, and therefore an editor cannot depart from his author's standpoint. The value of a book on the Law of Torts lies in the fact that it is a correct statement of the law as it will be applied in the Courts. A book which contains an exposition of the law which is demonstrably false is not only valueless, but dangerous. Sir John Salmond's opinions upon all matters still deserve that the greatest weight should be attached to them, but his main thesis (as it seems to me) is now of merely historical interest. His book as he left it was a notable attempt to discover reason in the Common Law, and gave the best picture of the Law of Torts regarded as liability for fault—a picture which might have been faithful in 1907, but to-day could only be regarded as misleading. I rejected therefore (not without misgivings) the first alternative.

I had little difficulty in rejecting the method of *Excursus*. Sir John Salmond's book is primarily a book for students, although it is also much used by Bench and Bar. Experience as a teacher has proved (as might have been expected) that the system by which doubt is cast in an *Excursus* upon the principle laid down in the body of the book is difficult for all but the very best students. It certainly is not a system which is helpful to the practitioner.

I have therefore entirely abandoned *Excursuses* in this volume, and I have no longer included notes suggesting dissent from the author's own views. At the same time I have always indicated (if two views are tenable) where the statements now appearing differ from those made by Sir John Salmond. I recognise my presumption in taking this responsibility upon myself, but it seemed to me inevitable if the book was to retain its present position as a textbook. And I can only plead that I have always had before my mind the fact that this is Sir John Salmond's book, not mine, and that the temptation to re-write, except on the clearest possible grounds, must be resisted.

I had the less hesitation in following the third course open to me because Sir John Salmond in the successive editions which he himself edited showed that he was always receptive of new ideas, and never hesitated to remodel his statement of the law when the decisions of the Courts made it desirable. The receptivity of his mind contributed as much as the profundity of his learning and his vigorous style to establish his book so rapidly as a work of authority.

The Courts have done much in the last decade to help us

towards a more systematic statement of the law of negligence, and to adjust the Common Law to the needs of modern life. \*But much remains yet to be done. Wary indeed must be the steps of an editor in 1984.

In fine, it must be sorrowfully confessed that those who wish to hear the authentic voice of the learned and distinguished author of this treatise must turn to the Sixth Edition.

W. T. S. STALLYBRASS.

BRASENOSE COLLEGE,  
OXFORD.

May 27, 1934.

## FROM THE PREFACE TO THE NINTH EDITION

THE publication of the American Restatement of the Law of Torts raised a serious question as to the extent to which reference should be made to it. The Restatement is not a book of authority even in America (a), and I decided after much consideration only to refer to it when it seemed to throw some particularly useful light on the problems of English law.

Once more I have to thank many kind and helpful reviewers. One reviewer, whose identity can easily be recognised as that of the distinguished Recorder who is Secretary to the Law Revision Committee, complains that I am not bolder in my condemnation of "decisions which are probably erroneous and of those which, though not likely to be reversed, are illogical or defective". I can only plead that in my opinion the editor of a textbook constantly used by practitioners is bound to adopt the attitude rather of the learned Recorder of Duffley than of the equally learned Secretary to the Law Revision Committee. The late Lord Darling once spoke of a "melancholy rule of law—not to be commended but to be followed", and it seems to be beyond the proper function of an editor to use a harsher epithet than "unsatisfactory" of decisions which he hopes may be overruled at such future date as the point involved may come before a higher tribunal.

W. T. S. STALLYBRASS.

BRASENOSE COLLEGE,  
OXFORD.

June 1, 1936.

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(a) See my review of it in 48 H. L. R. 1444.

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1930. 20 & 21 Geo. V, c. 39 (Housing), 252 n.
1930. 20 & 21 Geo. V, c. 43 (Road Traffic), 276 n., 508
1930. 20 & 21 Geo. V, c. 51 (Reservoirs, Safety Provisions), 21, 535 n.
1932. 22 Geo. V, c. 12 (Destructive Imported Animals), 546 n.
1932. 22 & 23 Geo. V, c. 36 (Carriage by Air), 73, 206 n., 354 n., 355, 447 n.
1931. 24 & 25 Geo. V, c. 41 (Law Reform (Miscellaneous Provisions)), 22, 70-1, 177, 341, 343, 347-55, 369 n.
1931. 24 & 25 Geo. V, c. 53 (County Courts), 12, 320 n.
1935. 25 & 26 Geo. V, c. 30 (Law Reform (Married Women and Tortfeasors)), 66-9, 76-9, 185, 447
1936. 26 Geo. V & 1 Edw. VIII, c. 33 (Widows', Orphans' and Old Age Contributory Pensions), 354
1936. 26 Geo. V & 1 Edw. VIII, c. 44 (Air Navigation), 205
1936. 26 Geo. V & 1 Edw. VIII, c. 49 (Public Health), 219 n., 236 n.
1936. 26 Geo. V & 1 Edw. VIII, c. 51 (Housing), 252 n., 501 n.
1937. 1 Edw. VIII & 1 Geo. VI, c. 67 (Factories), 510 n., 511
1938. 1 & 2 Geo. VI, c. 22 (Trade Marks), 593, 599-600
1939. 2 & 3 Geo. VI, c. 21 (Limitation), 169-77, 304-5, 352, 447 n.
1939. Lighting Restrictions Order, 45-6
1941. 4 & 5 Geo. VI, c. 39 (National Health Insurance, Contributory Pensions and Workmen's Compensation), 113
1941. Essential Work Order, 101
1943. 6 & 7 Geo. VI, c. 6 (Workmen's Compensation), 113
1943. 6 & 7 Geo. VI, c. 49 (Workmen's Compensation Temporary Insurance), 113
1945. Law Reform (Contributory Negligence) Bill, 417, 457, 462, 466. See also Preface viii-ix.

# THE LAW OF TORTS

## CHAPTER I

### INTRODUCTORY

#### § 1. The Forms of Action (a)

1. IN order that the following pages may be understood it is necessary at the very beginning to give a short explanation of the manner in which the Law of Torts has grown. In the fourteenth century remedies for wrongs were dependent upon Writs. No one could bring an action in the King's common law Courts without the King's writ. And the number of writs available was very limited. Where there was no writ there was no right. *Ubi remedium ibi jus* (b). One of Sir Henry Maine's most famous generalisations explains our early law: "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure" (c). Every plaintiff had to bring his cause of action within a recognised form of action, and "the key-note of the form of action is struck by the original writ, the writ whereby the action is begun" (d).

2. *Abolition of forms of action.*—For 500 years the writ determined the right. A mistaken choice of a wrong form of action or writ in 1830 would lose a just case (e). The development of the substantive law by the Judges, in spite of the ingenuity of pleaders in devising new forms and adapting old ones, was hampered by the limitations imposed by the writ (f). After some preliminary amendments of the law in 1832 and 1833, the Common Law Procedure Act, 1852, provided that "it shall not be necessary to

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(a) For fuller explanation of the writ system the reader is referred to Maitland, *Forms of Action*, lect. 1; Fifoot, *Background*, ch. 6; Sutton, *Personal Actions*, cc. 2 and 4; Plucknett, *History*, Bk. II, Pt. I, ch. 1; Chitty, *Pleading*.

(b) Salmond, *Jurisprudence*, p. 701.

(c) *Early Law and Custom*, p. 389.

(d) Maitland, *Forms of Action*, p. 299.

(e) Holdsworth, *H. E. L.* ix, 248-9.

(f) Cf. Lord Wright, 57 *L. Q. R.* p. 198.

mention any form or cause of action in any writ of summons". The forms of action were now on their death-bed (g). The way was prepared for the final *coup de grace* by the Judicature Act of 1873, and the rules made under it. Under them every pleading is to "contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies" (h) (i). So that Lord Justice Scrutton was able to say in 1930 (k): "Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and having done so, endeavour to give the right legal judgment on those facts". The House of Lords in *United Australia, Ltd. v. Barclays Bank* (l) finally settled that substance is predominant over form. The Courts no longer feel themselves "hide-bound by matters which concern form and not substance" (m). As Stable, J., has said (n): "The question is not now one of the appropriate form in which to clothe the right, but whether or not the right exists, although the absence of any clothing that fits may be an indication of the non-existence of the right". Now *ubi jus ibi remedium*.

8. *Subsisting importance of forms of action.*—But it is still necessary, notwithstanding their abolition, to know something of the nature and scope of the forms of action. "The forms of action", said Maitland at the beginning of this century (o), "we have buried, but they still rule us from their graves"—perhaps less imperiously to-day than when Maitland wrote, for Lord Atkin has said (p) that "when these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the

(g) Bullen and Leake, *Pleadings*, 274; Halsb., i, 62-4; Holdsworth, H. E. L. ix, 252; Fifoot, *Background*, p. 161.

(h) Ord. XIX, r. 4. See *Barnes v. Pooley* (1935), 153 L. T. 78, *per du Parcq, J.*, and Lord Wright in 57 L. Q. R. 197-8; Holdsworth, H. E. L. ix, 251 n (6).

(i) For an excellent concise statement of the nineteenth century reforms, see Sutton, *Personal Actions*, ch. 11.

(k) *Oakley v. Lyster*, [1931] 1 K. B. p. 151.

(l) [1941] A. C. 1. See Lord Wright in 57 L. Q. R. p. 184.

(m) *S.C.* p. 53, *per* Lord Porter. Cp. Lord Simon, L.C., at p. 22.

(n) *Dies v. British and International Mining Corporation*, [1939] 1 K. B. pp 738-9.

(o) *Forms of Action*, p. 296.

(p) *United Australia v. Barclays Bank*, [1941] A. C. p. 29.

Judge is to pass through them undeterred". A knowledge of the forms of action is necessary for the following reasons. In the first place, to one who is wholly ignorant of the old learning of writs and forms of action many of the older authorities on liability for civil injuries are unintelligible and misleading (q). Secondly, even at the present day, all satisfactory definition and classification of the different species of such injuries must be based on the old procedural distinctions between forms of action, and must conform to those distinctions except in so far as they no longer have any relation to the substantive law of the present day. Thirdly, questions as to the existence, nature, and extent of liability depend even yet in some instances on the particular kind of writ or remedy that would have been available for the plaintiff under the old practice (r). A clear illustration is the case of *Barnes v. Pooley* (s) in 1935. There, in order to determine whether the plaintiff's claim was barred by the Statute of Limitations, 1623, it was necessary for the Judge first to determine whether before the Common Law Procedure Act, 1852, the form of action would have been an action of trespass or an action on the case. Lastly, as Maitland pointed out, a lawyer can still "do his client a great deal of harm by advising a bad or inappropriate course of procedure, though it is true he cannot bring about a total shipwreck of a good cause so easily as he might have done some years ago" (t). So in *Konskier v. Goodman* (u) the plaintiff was deprived of costs because he had brought his action for negligence, whereas the true nature of his claim was trespass.

## § 2. Trespass and Case

1. *Trespass and case distinguished.*—Apart from detinue and replevin (which was not started by an original writ in the superior Courts), under the old practice the remedies for torts were two in number—namely, the action of trespass and that of trespass on the case (x) (commonly called by way of abbreviation case

(q) Cp. Lord Wright in 57 L. Q. R. p. 198. To understand them Sutton, *Personal Actions*, is indispensable.

(r) The classic source for the discovery of the law in the days of strict pleading is the third edition of Bullen and Leake's *Pleadings* (1868).

(s) (1935), 153 L. T. 78.

(t) *Forms of Action*, p. 308. Sutton, *Personal Actions*, pp. 58–62, gives some practical illustrations.

(u) [1928] 1 K. B. 421. And cp. in contract *Bagel v. Miller*, [1903] 2 K. B. 212.

(x) The action on the case (*super casum*), so called because the particular circumstances of the case are set out in the writ, goes back at least to the thirteenth century. After the passing of the Statute of Westminster II in 1285, the old action on the case, which was a residuary action, analogous to the Roman Law *actio in*

simply) (y) (z). Trespass—"that fertile mother of actions" (a)—was the remedy for all *forcible and direct* injuries, whether to person, land, or chattels. Case, on the other hand, provided for all injuries not amounting to trespasses—that is to say, for all injuries which were either not forcible or not direct, but merely consequential (b). An injury is an actionable wrong (bb).

*Forcible injuries.*—The term *forcible* is here used in a wide and somewhat unnatural sense to include any act of physical interference with the person or property of another. To lay one's finger on another person without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a stick. To walk peacefully across another man's land is a forcible injury and a trespass, no less than to break into his house *vi et armis*. But when there is no physical interference there is no trespass, and the proper remedy is *case*: as, for example, in libel, malicious prosecution, or deceit (c).

*Direct and consequential injuries.*—To constitute a trespass, however, it is not enough that the injury should be forcible; it must be also direct and not merely consequential. An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act; it is consequential, on the other hand, when, by reason of some obvious and visible intervening cause, it is regarded, not as part of the defendant's act, but merely as a consequence of it. In direct injuries the defendant is charged in an action of trespass with having done the thing complained of; in consequential injuries he is charged in an action of case with having done something else, by reason of which (*per quod*) the damage complained of has come about. In *Leame v. Bray* (d)

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*factum*, developed into the action of trespass on the case. For the history of the action on the case and its relation to the Statute of Westminster II, see the controversy between Landon and Plucknett, 52 L. Q. R. 68, 220, Winfield, pp. 3—4, and Lord Wright in 57 L. Q. R. p. 195.

(y) The importance of the distinction which Judges in the old cases constantly insisted upon, e.g., Lord Raymond in *Reynolds v. Clarke* (1725), 1 Str. p. 635, and Blackstone, J., in *Scott v. Shepherd* (1772), 2 W. Bl. p. 897, was that in trespass if the plaintiff recovered less than forty shillings he was entitled to no more costs than damages, whereas nominal damages in case carried costs with them. See also *Savignac v. Roome* (1794), 6 East 125; Winfield and Goodhart in 49 L. Q. R. pp. 364—6.

(z) Garnier, Trespass, goes so far as to say (p. 13) that the amplification of the original conception of trespass in English law was much greater than that of *damnum injuria datum* in Roman law. Trespass, he says (p. 111), gives the human person a degree of protection unknown on the Continent.

(a) Maitland, *Forms of Action*, p. 342. See lectures 4 to 6 of that work.

(b) See Winfield, *Province*, pp. 11—14.

(bb) *Vide infra*, s. 156 (8).

(c) Chitty, *Pleading*, 1, 140 (7th ed.).

(d) (1803), 3 East, at p. 602

the distinction is thus expressed and illustrated by Le Blanc, J.: "In all the books the invariable principle to be collected is that, where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put (e) of a man's throwing a log into the highway; if at the time of its being thrown, it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. . . . Trespass is the proper remedy for an immediate injury done by one to another, but where the injury is only consequential from the act done, there it is case".

To take other illustrations of the distinction. The act of throwing water into one's neighbour's premises is a trespass; but to fix a spout in such a fashion that rain water is discharged by it into those premises is a mere nuisance actionable in case (f), and to discharge water on to A's property so that it is carried down to B's property is a mere nuisance as regards B (g). Throwing a match, whether accidentally or on purpose, into another man's haystack is a trespass; lighting a fire on one's own land, which spreads into the adjoining property and burns a haystack there, is actionable only in case.

2. *Trespass not necessarily an intentional injury.*—This distinction between direct and consequential injury is not identical with that between intentional and accidental or negligent injury. These are cross divisions. Trespass lies for all direct injuries, whether wilful or merely negligent. Case is the appropriate remedy for all consequential injuries, even if they are intended. This was finally settled by the above mentioned case of *Leame v. Bray* (h), in which it was held that the act of the defendant in negligently driving his carriage so as to bring it into collision with that of the plaintiff was actionable in trespass. "There being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass, and wilfulness is not necessary to constitute trespass" (i) (k).

(e) By Fortescue, J., in *Reynolds v. Clarke* (1725), 1 Str. p. 636.

(f) *Reynolds v. Clarke* (1725), 1 Str. 634; 2 Ld. Raym. 1399.

(g) *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. 81.

(h) (1803), 3 East 593.

(i) 3 East p. 600. *Aliter*, if it had been the defendant's servant who had driven the carriage: *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580.

(k) In the old practice the distinction between trespass and case was further complicated by the fact that in certain instances these two remedies were concurrent, the plaintiff having the option of suing in either form of action for the same injury. Thus, when a trespass produced not only a direct but also a conse-

3. *Different senses of the term trespass.*—The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (a) In its widest and original signification it includes any wrongful act—any infringement or transgression of the rule of right. This use is common in the Authorised Version of the Bible, and was presumably familiar when that version was first published. But it never obtained recognition in the technical language of the law, and is now archaic even in popular speech. (b) In a second and narrower signification—its true legal sense—the term means any legal wrong for which the appropriate remedy was a writ of trespass as already defined—*viz.*, any direct and forcible injury to person, land, or chattels. (c) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense—*viz.*, the tort of trespass to land (*trespass quare clausum fregit*).

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quential injury, the plaintiff might either sue in trespass (alleging the consequential injury as special damage); or he might waive the trespass and sue in case for the consequential injury as the cause of action: *Scott v. Shepherd* (1772), 2 W. Bl. p. 897, *per* Blackstone, J. So also it was settled, illogically enough, that when damage was caused by negligence, the plaintiff could always sue in case, if he pleased, even though the injury was direct; yet in strict logic trespass was in such instances the exclusive remedy: *Moreton v. Hardern* (1825), 4 B. & C. 223. Where, however, the injury was wilful and direct, case was not available. Such departures from the strict application of the distinction no longer concern us, for they have left no traces in the substantive law and may now be wholly disregarded. On the whole matter, see also *Holmes v. Mather* (1875), L. R. 10 Ex. p. 268; *Morley v. Gaisford* (1795), 2 H. Bl. 441; *Scott v. Shepherd* (1772), 2 W. Bl. 892, in which the dissenting judgment of Blackstone, J., must be taken to be correct in principle. See further Winfield, 42 L. Q. R. p. 193; Winfield and Goodhart, 49 L. Q. R. 359.

## CHAPTER II

## GENERAL PRINCIPLES OF LIABILITY

## § 3. The Nature of a Tort

1. *Civil and criminal wrongs.*—A tort is a species of civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant: for example, an action for the recovery of a debt, or for the restitution of property, or for the specific performance of a contract, or for an injunction against a threatened injury, or for the recovery of damages for an injury committed. Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, demanding the enforcement of some right vested in himself; he who proceeds criminally is an accuser, demanding nothing for himself, but merely the punishment of the defendant for a wrong committed by him (a).

It is often the case that the same wrong is both civil and criminal—capable of being made the subject of proceedings of both kinds. Assault, libel, theft and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished criminally by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.

2. *Action for damages the essential remedy for a tort.*—Although a tort is a civil injury, not all civil injuries are torts, there being certain classes of such injuries which for special reasons are excluded from this department of the law. In the first place, no civil injury is to be classed as a tort unless the appropriate remedy for it is an

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(a) For a more elaborate discussion of the difference between criminal and civil proceedings, see Kenny, ch. 1; Allen, *Legal Duties*, pp. 221–252; Winfield, *Province*, ch. 8. See also *R. v. Bateman* (1925), 91 L. J. K. B. 791; *Proprietary Articles Trade Association v. Att.-Gen. for Canada*, [1981] A. C. pp. 323–5.



action for damages. Such an action is an essential characteristic of every true tort.) Thus, a public nuisance is not to be deemed a tort merely because the civil remedy of injunction may be obtained at the suit of the Attorney-General; it is a tort only in those exceptional instances in which a private person may recover damages for loss sustained by him in consequence thereof. Nor is a refusal to perform a statutory duty a tort if the only remedy is a *mandamus*. Nor is any wrong a tort if the appropriate remedy is an action, not for unliquidated damages, but for a liquidated sum of money—e.g., an action for money paid by mistake, or due under a judgment, or paid to the use of another without contract (b). Such claims are classed by our law as quasi-contractual, being based on a fictitious contract implied in law, but in truth they belong neither to the sphere of contract nor to that of tort (c).

Although an action for damages is the essential remedy for a tort, there may be and often are other remedies also. In an action for a private nuisance an injunction may be obtained in addition to damages. In an action for the detention of a chattel an order for specific restitution may be obtained in certain cases (d) instead of judgment for its value. In an action by a plaintiff dispossessed of his land he recovers the land itself, in addition to damages if he has suffered any during the period of his dispossession. But in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.

3. *Tort and breach of contract.*—In the second place, no civil injury is to be classed as a tort if it is solely a breach of contract.) Breach of contract is a species of wrong which stands apart from all others and is governed by a special body of law different in many important respects from that which determines other forms of civil liability.

*Concurrence of tort and breach of contract.*—It is often the case, however, that the same wrong is both a breach of contract and a tort. There are many instances in which a person voluntarily binds himself by a contract to perform some duty which already lies upon him independently of any contract. The breach of such a contract is also a tort, inasmuch as liability would equally have existed in such a case had there been no contract at all: for example, when a

(b) Cp *Att Gen v. Canter*, [1938] 2 K. B. 826, affirmed [1939] 1 K. B. p. 326.

(c) See Winfield, *Province*, ch. 7, and the controversy between Winfield, *London and Stallybrass in Bell Yard*, Nov., 1931, p. 19; May, 1932, p. 32; Nov., 1932, p. 18.

(d) *Vide infra*, s. 82.

passenger whilst travelling with a ticket is injured owing to the railway company's negligence, the company is guilty of a wrong which is both a breach of contract and a tort. Similarly, a bailee who wrongfully refuses to restore the property lent to him is liable both in contract and in tort: in contract because of his promise to restore it in due time, and in tort because no one has a right to detain another's property without some special justification (e). Such concurrent liability in tort and contract is found in the case of bailees, carriers (f) and probably other persons recognised at common law as exercising a common calling and thereby owing duties to the public such as smiths and innkeepers (g). In other cases it depends on the existence of a duty in tort independent of the contract (h).

Where but for the contract there would be a concurrent liability in tort and contract the contract may give express protection to what would otherwise be a tort. The plaintiff cannot then disregard any limitation of liability under the contract by alleging a wider liability in tort (i). Where in tort the same duty is owed by A and B to X, and A has protected himself from liability under the contract, the law is not so clear. If the relationship of agency exists between A and B the limitation of liability enures in favour of B as well as of A. Any other rule would lead to absurd results (k). And there is a tendency to extend the same rule to other cases where the alleged tort is connected with the performance of a contract entered into between A and X (l).

Again, the contractual duty may be owed to one person, the duty independently of contract to another. The surgeon who is called in by the father to operate upon his daughter owes a contractual duty

(e) See Winfield, *Province*, ch. 5, and Bell *Yard*, *ubi supra*.

(f) *Groom v. Crocker*, [1939] 1 K. B. p. 222, *per* Scott, L.J.

(g) *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. pp. 406-7. Salmond (9th ed.), p. 10, cited a doctor treating a patient negligently as a typical instance of such concurrent liability, and *Edwards v. Mallan*, [1908] 1 K. B. 1002 (negligent extraction of a tooth), is recent authority in support of this view; but Scott, L.J., *ubi supra*, classed the doctor with architects, stockbrokers and solicitors. See also Winfield, pp. 717-20.

(h) *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. 399. Salmond, *ubi supra*, thought the rule was of general application, but it seems that the cases upon which he relied are no longer applicable.

(i) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 213, *per* Scrutton, L.J.

(k) *Elder Dempster v. Paterson, Zochonis*, [1924] A. C. 522. But Lord Sumner based (at p. 564) his opinion in that case on the ground that it was a bailment on terms, which included the limitations of liability stipulated in the contemplated bill of lading.

(l) E.g., *S.C.*, *per* Lord Finlay, at p. 548; *The Kite*, [1933] P. 154; *Humphrey v. Baxter, Hoare* (1933), 149 L. T. 603; *Fosbrooke-Hobbes v. Airwork, Ltd.*, [1937] 1 A. E. R. p. 112.

to the father to use due care. If he fails in that duty he is also liable for a tort against the daughter (m).

It must not be supposed, indeed, that there is any general rule of English law that he who, by breaking a contract with one person, causes harm to another, is liable to that other in an action of tort. In general, as we shall see in the sequel, he is under no such liability, and owes no duty save to the person with whom he contracted (n). Nevertheless in certain exceptional instances this concurrence of contractual and delictual liability does exist, and we are here concerned, not with the details of the matter, but merely with the significance of such concurrence in respect of the nature and definition of a tort (o).

4. *Fictitious concurrence of tort and breach of contract.*—The true boundary-line between contract and tort is obscured by the recognition in the older law (a recognition which has not yet wholly ceased) of certain quasi-contractual obligations the breach of which is really a mere tort (p).

*Quasi-contract.*—It was, under the old practice, and indeed still is, permissible in certain cases to *waive* a tort and sue instead on a fictitious contract implied in law. Thus, if A takes away and sells a chattel belonging to B, B instead of suing him in tort for the value

(m) *Meux v. G. E. Ry.*, [1895] 2 Q. B. 387 (injury to goods by negligence of carrier, whether contract of carriage made with owner of goods or not); *Gladwell v. Steggall* (1839), 5 Bing. N. C. 733, and *Pippin v. Sheppard* (1822), 11 Price 400 (negligence of surgeon); *Donoghue v. Stevenson*, [1932] A. C. 562 (deleterious food and drink). *Vide infra*, s. 149. Contrast *Hunt v. Damon* (1930), 46 T. L. R. 579 (wrongful expulsion of girl from school).

(n) *Infra*, ss. 57 (7), 134 (4), 149 (4), 150 (7). See in particular on this question Winfield, c. 28.

(o) The concurrence of contractual and delictual liability is illustrated by the following cases, in all of which the act of the defendant was held to be a tort, although clearly at the same time a breach of contract: *Bryant v. Herbert* (1878), 3 C. P. D. 389 (wrongful detention of chattels lent); *Kelly v. Metropolitan Ry.*, [1895] 1 Q. B. 944 (injury to passenger through negligence of railway servant); *Taylor v. Manchester, etc., Ry.*, [1895] 1 Q. B. 134 (the same); *Foulkes v. Metropolitan Ry.* (1880), 5 C. P. D. 157 (the same); *Turner v. Stallibrass*, [1898] 1 Q. B. 56 (injury to horse lent); *Pontifex v. Midland Ry.* (1877), 3 Q. B. D. 23 (wrongful delivery of goods by carrier to consignee after notice of stoppage *in transitu*); *Sachs v. Henderson*, [1902] 1 K. B. 612 (wrongful removal of fixtures by landlord in interval between agreement for lease and actual demise); *de Freville v. Dill* (1927), 138 L. T. 83 (negligence of doctor in certifying as lunatic); *Langridge v. Levy* (1837), 2 M. & W. 519; 4 M. & W. 337 (personal injuries caused to plaintiff through fraud of defendant in selling a dangerous chattel to a third person); *Payne v. Rogers* (1791), 2 H. Bl. 350 (injury to passenger in highway caused by failure of landlord to fulfil his contract with tenant to keep the premises in repair); *Edwards v. Mallan*, [1908] 1 K. B. 1002 (negligent extraction of a tooth); *Donoghue v. Stevenson*, [1932] A. C. 562 (circulation of poisoned ginger beer); see especially pp. 609—610, *per* Lord Macmillan.

(p) On this subject see Wright, *Legal Essays*, pp. 1—65; Jackson, *Quasi-Contract*, pp. 127—30; Holdsworth, 55 L. Q. R. 37; Winfield, 55 L. Q. R. 161; and *United Australia v. Barclays Bank*, [1941] A. C. 1.

of the chattel may sue him for the price so received by him on its sale, on a fictitious contract of agency. This doctrine of the waiver of torts will be considered more fully in a subsequent chapter (q).

*Assumpsit and case.*—The boundary line between tort and contract has been further obscured by the fact that the action of *assumpsit*, which was the general remedy for the breach of a simple contract, was in its origin a mere variety of the action of *case*, which was one of the most important remedies for a tort. Our law possessed originally no effective remedy for the breach of a simple contract. When the breach of such a contract was also a true tort, the delictual remedies of *trespass* and *case* were available; but when the wrong was a mere breach of contract the rigour of the older law denied any action save in exceptional cases. This defect was ultimately overcome by the device of suing in tort (in the action of *case*), even when there was no real tort at all, but merely a breach of contract. In the result the action of *case*, when so perverted from its proper uses and employed as a contractual remedy, became differentiated into a distinct action—namely, *assumpsit*. The improvement thus effected in the law was great, for it rendered possible for the first time the development of a comprehensive law of contract. But this benefit was not obtained without cost. It was based upon a fictitious identification of torts with breaches of contract, and until the last days of strict pleading the effects remained visible of this confusion and partial obliteration of the boundary-line between the law of torts and the law of contracts. For, notwithstanding the differentiation of the action of *assumpsit*, it continued to be permissible in many cases to sue in the original delictual action of *case* for causes of action which were undoubtedly merely contractual (r). Until the abolition of forms of action, therefore, it remained impossible to draw any logical distinction between contract and tort which would have conformed to the established rules of procedure. At the present day we are at liberty to disregard these perversities of the old pleading and practice and to draw in accordance with logical requirements the boundary-line between contract and tort (s). Sir John Salmond did not himself tell us

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(q) *Vide infra*, s. 41.

(r) For a fuller explanation of the history of *assumpsit*, see Ames, Lectures, pp. 259 *sqq.*; Holdsworth, H. E. L., iii, 414—453; v, 295—297; viii, 1—98; Holmes, Common Law, pp. 274—288.

(s) For examples of actions of tort for pure breaches of contract (which Salmond called quasi-torts, a terminology which has not been adopted) see *Marzetti v. Williams* (1830), 1 B. & Ad. 415 (banker dishonouring customer's cheque); *Weall v. King* (1810), 12 East 452, and *Green v. Greenbank* (1816), 2 Marsh. 485 (breach of warranty on sale); *Burnett v. Lynch* (1826), 5 B. & C. 689 (breach of contract

where the boundary-line was logically to be drawn. Professor Winfield has done so (†): "At the present day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by the law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally, in contract it is towards a specific person or specific persons".

5. *Difference between tort and breach of contract.*—It is often of practical importance to determine whether an action is in substance contractual or for a tort, *e.g.*, when the defendant is an infant, and for determining costs under the County Courts Act, 1934 (u). In a case of the latter kind (v), Greer, L.J., said: "Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract".

6. *Tort and breach of trust.*—No civil injury is to be classed as a tort if it is only a breach of trust or a breach of some other merely equitable obligation. The reason of this exclusion is historical only. The law of torts is in its origin a part of the common law, as distinguished from equity, and it was unknown to the Court of Chancery. Wrongs, therefore, such as breach of trust, which fell exclusively within the jurisdiction of that Court, stand outside the category of tort, and are governed, just as breach of contract is, by a body of

of indemnity). There are even judicial *dicta* which carry these and similar cases to their ultimate logical conclusion—namely, the inclusion of the whole sphere of contract within that of tort. "Wherever there is a contract", says Lord Campbell in *Brown v. Boorman* (1844), 11 Cl. & F. p. 44, "and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract." (Winfield, pp. 718-9, gives a more limited interpretation to the case.) If this were indeed so, the whole distinction between tort and breach of contract would be reduced to a matter of the form of pleading. Fortunately for the rationality of our law the abolition of the old system of procedure has enabled us to get back to the substance of the matter, taking no further account of these anomalies of form: *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. 399, 406.

(†) Province, p. 40. Ch. 4 discusses the matter at length. Bohlen, *Studies*, p. 87, states the distinction as follows: "If the obligation is one imposed by law, either to act or to refrain from action, because the performance of such obligation is usually necessary in order to prevent probable injury to others, the obligation is fundamentally one of the law of torts. An obligation to do an act which will confer a benefit and whose breach will cause no other injury than the loss of such expected benefit, is purely contractual." *Cp. op. cit.* pp. 39-40, 62-4, 86-7.

(u) Winfield, *Province*, ch. 4. *Cp. cases citcd, infra*, s. 15.

(v) *Jarvis v. Moy, Davies & Co.*, [1936] 1 K. B. p. 405.

special rules differing in sundry respects from those which have been developed by the common law of torts. And although at the present day the difference between equitable and common-law jurisdiction has disappeared, it is still requisite to preserve the memory of it in defining the limits of the law of torts (*w*).

7. *Summary*.—Summing the matter up, we have seen that there are four classes of wrongs which stand outside the sphere of tort:—

- (a) Wrongs exclusively criminal;
- (b) Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively;
- (c) Civil wrongs which are exclusively breaches of contract;
- (d) Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation.

*Tort defined*.—We may accordingly define a tort as a *civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation* (*x*).

#### § 4. The General Conditions of Liability *action*.

1. *General principle*.—In general, a tort consists in some act done by the defendant whereby he has without just cause or excuse caused some form of harm to the plaintiff (*y*).

2. *Damage*. The law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs. The fundamental principle of this branch of the law is *Alterum non*

(*w*) See the question discussed at length, Winfield, *Province*, ch. 6.

(*x*) The terms *tort* and *wrong* were originally synonymous and co-extensive in application. *Tort* is derived from the Latin *tortum*, while *wrong* is in its origin identical with *wrung*, both the English and the Latin terms meaning primarily, therefore, conduct which is crooked or twisted, as opposed to that which is straight or right (*rectum*). *Tort*, however, has become specialised in its application, while *wrong* has remained generic. No satisfactory definition of a tort has yet been found: "Never did a Name so obstruct a true understanding of the Thing": Wigmore, *Cases on Torts*, i, Preface viii. For criticisms of suggested definitions, see Jeremiah Smith, 80 H. L. R. pp. 249—254, *Harvard Essays*, pp. 184—9; Winfield, *Province*, ch. 12. Winfield's own definition (*op. cit.* pp. 32, 229; *Torts*, p. 6) is: "Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages." Winfield deals with some criticisms of his definition at p. 14. Landon (*Bell Yard*, Nov. 1931, pp. 20, 32) would define a tort as "a breach of duty which would have been remediable before 1852 by one of the writs of trespass, case and detinue".

(*y*) Scavey says that the causing of harm is predominantly the basis of tort liability, "harm is the tort signature": 56 H. L. R. p. 78.

*laedere*—to hurt nobody by word or deed. An action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage so suffered.

8. *Damnum sine injuria*.—Nevertheless there are many forms of harm of which the law takes no account. There are many acts which, though harmful, are not wrongful, and give no right of action to him who suffers their effects. Damage so done and suffered is called *damnum sine injuria* (z), and the reasons for its permission by the law are various and not capable of exhaustive statement. For example (a), the harm done may be caused by some person who is merely exercising his own rights; as in the case of the loss inflicted on individual traders by competition in trade (b), or in the case where the defendant is exercising a right of property (c), or where the damage is done by a man acting under necessity to prevent a greater evil (d). Or the harm complained of may be too trivial, too indefinite, or too difficult of proof for the legal suppression of it to be expedient or effective (e). Thus no action, it seems, will lie to recover damages for mere mental suffering unaccompanied by physical harm, though caused by the wilful act or the negligence of the defendant (f). So also the harm done may be of such a nature that the law considers it inexpedient to confer any right of pecuniary redress upon the individuals injured, but provides some other remedy, such as a criminal prosecution, as exclusively appropriate. Such is the case, for example, with the harm which an individual suffers in common with the public at large by reason of the existence of a public nuisance (g).

\* (z) The term *injuria* is here used in its original and proper sense of *wrong* (in *jus*, contrary to law). The modern use of "injury" as a synonym for damage is unfortunate but inveterate. It is to be hoped, however, that the observations of Lord Simon, L.C., in *Croft v. Woodall*, [1942] A. C. p. 442, may lead to a return to a stricter use of the word. *Vide infra*, s. 156 (8).

(a) For other instances see Dr. Glanville Williams' article in 7 Camb. L. J. 111 *sqq.*

(b) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25. *Infra*, s. 156 (1).

(c) *Mayor of Bradford v. Pickles*, [1895] A. C. 587. *Infra*, s. 6 (3). ✓

(d) *Vide infra*, s. 6 (5).

(e) *Cp. Corbett v. Burge* (1932), 48 T. L. R. 626.

(f) *Vide infra*, s. 91 (1). So no *solatium* for wounded feelings is recoverable under the Fatal Accidents Act for the death of a relative: *Blake v. Midland Ry.* (1852), 18 Q. B. 93.

(g) *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316. *Infra*, s. 69 (5). Other instances of *damnum sine injuria* are *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, *infra*, s. 150 (7); *Derry v. Peek* (1889), 14 A. C. 387, *infra*, s. 150 (5); and defamatory statements made on a privileged occasion and fair comment, *infra*, ss. 108–13.

4. *Is there any general principle of liability?*—Since, therefore, all harm is not actionable, it is necessary to ascertain whether liability for harm is the general rule, subject to specific exceptions based on definite grounds, or whether, on the contrary, the general rule is one of exemption from liability save in those specific instances in which the law declares that particular kinds of harm are wrongful. In other words: Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? Sir John Salmond took the view that the second of these alternatives was that which had been accepted by our law. “Just as the criminal law consists of a body of rules establishing specific offences, so”, he said, “the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse” (h).

For Sir John Salmond there was no English law of tort; there was merely an English law of torts, that is, a list of acts and omissions which, in certain conditions, were actionable (i). This book is entitled the Law of Torts, not the Law of Tort. “The forms of action”, Sir John Salmond said elsewhere (k), “are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling.” Every plaintiff must bring his case under one of the recognised heads of tort (l).

Professor Winfield in an article published in 1927 (m) attempted

(h) Glanville Williams, 7 Camb. L. J. p. 112, criticises this statement on the ground that there is no such thing as “proof” that the facts will result in liability; that is a matter for argument, not evidence.

(i) So Slessor, *The Law*, pp. 146–7; Landon’s *Excursus* in Pollock, pp. 43–5; Goodhart in 2 Mod. L. R. 1 *sqq.* See also Glanville Williams in 7 Camb. L. J. p. 115.

(k) 21 L. Q. R. 43. Cp. Maitland, *Equity*, 296. But *vide supra*, s. 1 (3).

(l) Cp. Lord Herschell in *Allen v. Flood*, [1898] A. C. p. 138.

(m) “The Foundation of Liability in Tort”, 27 Col. L. R. 1. Cp. his *Province*, ch. 3, and C. K. Allen in 40 L. Q. R. pp. 174–184; Sullivan in 2 Mod. L. R. pp. 88–9. Sir Frederick Pollock in the Preface to the first edition of his *Torts* said: “The purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts.” Cp. his *Torts*, pp. 16–18, and 47 L. Q. R. 589. Of Pollock’s alleged view that all harm is



to show that it is very doubtful whether this is true now, or ever has been true. There is not a single case (n) in the reports, he said, in which an action has been refused on the sole ground that it was new, though clearly the novelty of an action will raise a presumption against it. "Torts are infinitely various", said Pratt, C.J., in *Chapman v. Pickersgill* (o), "not limited, or confined", and we can trace the origin of many torts which are recognised as such at the present day, of malicious prosecution (p), of deceit in *Pasley v. Freeman* (q), of inducement of breach of contract in *Lumley v. Gye* (r), of the action for inducing a wife to leave her husband in *Winsmore v. Greenbank* (s), and of libel (t) (u). So Professor Winfield said that he preferred the theory that "all injuries (w) done to another person are torts, unless there is some justification recognised by law". But his thesis did not find general acceptance (x) and he has now modified his opinion to the extent that he admits that "from a narrow practical point of view" Sir John Salmond's view "suffices", but he still thinks that "from a broader outlook" his own theory is valid (y).

It seems clear that English law recognises no general right not to be damaged by another—not even if that other acts in bad faith and intending to cause the damage (z). But the common law has not proved powerless to attach new liabilities and create new duties

actionable unless it falls within some specific and recognised ground of justification or excuse Sir John Salmond said: "It is one which I should gladly accept as affording a comprehensive and logical basis for the law of torts; but it seems hard to reconcile it with the actual contents of our legal system. It is difficult to see that English law contains any reasoned and exhaustive list of the grounds of exemption from liability. The only adequate answer to many claims for damages is the mere *ipse dixit* of the law that no such cause of action is recognised." [In fact Pollock emitted his proposition to wilful harm.]

(n) Unless Lord Hewart, C.J., is to be understood as having decided *Hunt v. Damon* (1930), 46 T. L. R. 579, on that ground.

(o) (1762), 2 Wils. p. 146. Cp. Lord Herschell in *Allen v. Flood*, [1898] A. C. pp. 127-8.

(p) Winfield, *History of Conspiracy*, ch. 5.

(q) (1789), 3 T. R. 51.

(r) (1853), 2 E. & B. 216.

(s) (1745), Willes 577.

(t) Holdsworth, *H. E. L.*, viii, 346-378. Cp. Nathan Isaacs in 31 *H. L. R.* p. 973, *Harvard Essays*, p. 254. Goodhart regards these cases as instances of the gradual extension of old torts rather than as of the conscious creation of new torts: 2 *Mod. L. R.* pp. 8-10.

(u) Winfield now adds another alleged new tort of causing harm by carelessness in a dangerous process; first given definite recognition in *Honeywill & Stein v. Larkin*, [1934] 1 K. B. 191. But *vide infra*, p. 117, n. (b), and *Read v. Lyons Ltd.* (1944), 61 T. L. R. 148.

(w) Presumably he means "damage", otherwise it is in effect an "identical proposition". see 7 *Camb. L. J.* p. 115.

(x) See references in note (i), *supra*.

(y) Winfield, pp. 20-21.

(z) See Dr. Glanville Williams' valuable discussion, 7 *Camb. L. J.* pp. 117-31.

where experience has proved that it is desirable (a). Even in the days when the development of the law was impeded by the tyranny of the forms of action, this was true owing to the wide scope of the action upon the case (b). The action upon the case was elastic enough to provide a remedy for any injurious acts causing damage, provided no precedent stood in the way. There is a cause of action at common law wherever there is negligence causing damage in circumstances in which a duty is owed to the plaintiff to take care, and it is for the Courts to say when there is a duty to take care. The avenue to the development of the law is the action on the case for negligence. The Courts have (subject to precedent) complete power to determine whether a duty of care is in the circumstances of the case owed by the defendant to the plaintiff. When relationships come before the Courts which have not previously been the subject of judicial decision the Court is unfettered in its power to grant or refuse a remedy for negligence. The action on the case for negligence has no limits set upon its territory, save by previous decisions upon such specific relationships as have come before the Courts (c). "The categories of negligence are never closed" (d).

The safest conclusion seems to be that, although we have not yet discovered any general principle of liability, the Courts, where they are not fettered by any precedent, to-day have a bias towards holding that, where one man has intentionally or carelessly caused damage to another, he shall recompense him. In consequence, as the law develops we are moving in the direction of a general principle of liability (e).

5. *Injuria sine damno*.—Just as there are cases in which damage is not actionable as a tort (*damnum sine injuria*), so conversely

(a) *Donoghue v. Stevenson*, [1932] A C p 619, per Lord Macmillan. So in some jurisdictions in America the common law has proved flexible enough to create a right of privacy. *Burdick Torts* (5th ed.) p 69. *Warren and Brandeis* 4 H. L. R. 193, *Harvard Essays*, 122, *Pound*, 23 H. L. R. 362-4, *Harvard Essays*, 106-8; 43 H. L. R. 297. In England this is not yet recognised. *Corelli v. Wall* (1906), 22 T. L. R. 532; per Greer, L. J., in *Tolley v Fry* [1930] 1 K B p 478; though in an unreported case, *Funston v Pearson*, *The Times*, March 12, 1915, *Serutton, J.*, allowed an action of libel to succeed in similar circumstances. See *Winfield* in 47 L. Q. R. 23, 326, and for foreign law 47 L. Q. R. 203, 319.

(b) *Vide supra*, s 2.

(c) *Stallibrass* in *Bell Yard*, Nov. 1932, p 25. Cf. Lord Atkin and Lord Macmillan in *Donoghue v Stevenson* [1932] A C pp 579-81, 619.

(d) *Donoghue v Stevenson* at p 619 per Lord Macmillan.

(e) *Stallibrass* in *Bell Yard*, Nov., 1932 pp 24-5. *Friedmann, Legal Theory*, pp 290-1. It is somewhat paradoxical that Sir John Salmond, who endeavoured to force the law of torts into the uncomfortably strait jacket of 'no liability without fault' (*infra*, s 4 (6)), should have denied the existence of a law of tort.

there are cases in which an act is actionable as a tort, although it has been the cause of no damage at all (*injuria sine damno*). Torts are of two kinds—namely, those which are actionable *per se*, and those which are actionable only on proof of actual damage resulting from them. The law sometimes says to a defendant: You will be held liable if you do such and such an act. At other times it says merely: You will be held liable if, in consequence of such and such an act, damage is inflicted on the plaintiff. Thus the act of trespassing upon another's land is wrongful and actionable, even though it has done the plaintiff not the slightest harm. "By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence but he is liable to an action, though the damage be nothing" (f). Similarly a libel is actionable *per se*, while slander, on the other hand (that is to say, verbal as opposed to written defamation), is in most cases not actionable without proof of actual damage.

In those cases in which a right of action is conferred on a person who has sustained no harm, it is sometimes said that the law conclusively presumes damage (g).

6. *Fault as a condition of liability.*—Sir John Salmond said that a second condition usually demanded by the law for liability in an action of tort was the existence of either wrongful intention or culpable negligence on the part of the defendant. Sir John Salmond laid great stress (h) upon this element of fault. His view was as follows: "The ultimate purpose of the law in imposing liability on those who do harm to others is to prevent such harm by punishing the doer of it. He is punished by being compelled to make pecuniary compensation to the person injured. It is clear, however, that it is useless to punish any person, either civilly or criminally, unless he acted with a guilty mind. No one can be deterred by a threat of punishment from doing harm which he did not intend and which he did his best to avoid. All that the law can hope to effect by way of penal discipline is to make sure that men will not either wilfully or carelessly break the law and inflict injuries upon others.

"Pecuniary compensation is not in itself the ultimate object or

(f) *Entick v. Carrington* (1765), 19 St. Tr. 1066.

(g) See Lord Wright, M.R., in *Nicholls v. Ely Beet Sugar*, [1936] Ch. pp. 350-1.

(h) (7th ed.), pp. 11-12.

a sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion. When one man does harm to another without any intent to do so and without any negligence, there is in general no reason why he should be compelled to make compensation. The damage done is not thereby in any degree diminished. It has been done, and cannot be undone. By compelling compensation the loss is merely shifted from the shoulders of one man to those of another, but it remains equally heavy. Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence; and in general the only purpose so served is that of punishment for wrongful intent or negligence. There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any *mens rea* on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether" (i).

Of *Rylands v. Fletcher* (j), which runs counter to his view, he said in the preface to the sixth edition: "No decision in the law of torts has done more to prevent the establishment of a simple, uniform, and intelligible system of civil responsibility".

But fault has never been, and is not to-day, an essential element in tortious liability (k). Sir John Salmond wrote at the beginning of the twentieth century, and as has been said (l), "the opening of the twentieth century found us with a well-developed theory of tort law, in which fault was an important, if not the all-important, element". There are two main theories of the history in English law of the relations between blameworthiness and civil responsibility. According to Holmes in his *Common Law* the law began with liability based upon "actual intent and actual personal culpability" and tended, as it grew, to formulate external standards which might subject an individual to liability though there was no fault in him. According to Wigmore (m) the law began by making a man act at his peril and gradually became moralised until liability

(i) For a discussion of this matter, see Holmes's *Common Law*, pp. 81-96; Pollock, pp. 106-15; and Landon's *Excursus*, *ibid.* pp. 140-5.

(j) *Vide infra*, ch. 17.

(k) Winfield, *Province*, p. 216.

(l) Nathan Isaacs in 31 *H. L. R.* p. 974, *Harvard Essays*, p. 255.

(m) Wigmore, *Responsibility for Tortious Acts*, 7 *H. L. R.* 315, 383, 441, *A. A. L. H.*, iii, 474, *Harvard Essays*, 18. When the line between tort and crime was difficult to draw (cp. 41 *L. & Q. R.* 137) it is natural to find a conception of *mens rea* as essential to liability in both tort and crime.

torts by way of those cases in which there was a contractual relationship (a).

Since he held that wrongful intention or culpable negligence was a condition of civil liability in tort it is natural that Sir John Salmond should have considered pecuniary compensation, not as in itself the ultimate object or a sufficient justification of legal liability, but as a means of punishment. But though, as has been said (b), "an entirely new system of jurisprudence might well contain, as a fundamental principle, the conception that liability to repair harm done is only to be imposed as a species of punishment for misconduct, moral or social", this was not the original conception of English law, nor is it generally considered to be the conception of English law to-day.

That great common lawyer Lord Sumner said (c): "The object of a civil inquiry into cause and consequence is to fix liability on some responsible person, and to give reparation for damage done, not to inflict punishment for duty disregarded".

Where fault is a condition of liability, it commonly makes no difference in respect of the existence or measure of civil liability whether the defendant has been guilty of wrongful intent or merely of negligence. When a man is liable for doing a certain kind of harm intentionally, he is in most cases equally liable if he does it negligently (d). This rule, however, is subject to certain exceptions—cases in which wrongful intent is a ground of liability, but negligence is not. To take a single example, it is actionable to cause harm to a person by wilfully and fraudulently deceiving him, but it is not in general actionable to do similar harm by means of a merely negligent misrepresentation (e).

(a) The history is clearly told in Holdsworth, *H. E. L.*, viii, 448-58; Winfield, *History of Negligence in the Law of Torts*, 42 L. Q. R. 184.

(b) Bohnen, *Studies*, pp. 438-40, 529-31. See also C. K. Allen, 40 L. Q. R. pp. 178-80.

(c) *Weld-Blundell v. Stephens*, [1920] A. C. p. 986. An interesting legislative departure from this principle is afforded by the Law Reform (Miscellaneous Provisions) Act, 1934, in which executors and administrators can recover damages for the pain and suffering of the deceased. *Vide infra*, s. 20 (5). Counsel in *Slater v. Spreag* (1935), 51 T. L. R. 577, argued that if the deceased had bequeathed his estate to the British Museum it would be impossible to compensate such an institution for the pain suffered by the testator. That cannot be denied, but the Legislature, reverting to the idea of punishment as distinguished from compensation, has enacted that the wrongdoer shall not escape the consequences of his wrong-doing merely because his victim has died. Contrast the point of view of the Law Revision Committee (Cmd. 4540, s. 4).

(d) Cp. Winfield and Goodhart in 49 L. Q. R. 359.

(e) *Derry v. Peek* (1889), 14 A. C. 337.

## § 5. Liability without Fault

1. In certain cases, which Sir John Salmond not very happily classed together as cases of absolute liability (*f*), liability is independent of intention or negligence (*g*).

2. *Vicarious liability*.—In general a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious responsibility for the acts of others, however blameless himself. The most important and far-reaching instance of this is the responsibility of a master for his servant (*h*).

3. *Inevitable mistake usually no defence*.—Inevitable mistake is commonly no defence against civil liability. Any act of wilful interference with the property, person, reputation, liberty, or other right of another on a supposed justification is done at the doer's peril; and if the justification does not in truth exist, a belief in its existence, however honest and reasonable, is no defence. It makes no difference in such a case whether the mistake is one of fact or one of law.

Thus, an auctioneer who sells and delivers goods on behalf of a customer having no title to them is liable for their value to the true owner, even though he so acted in good faith and without negligence, and even though he has already paid the proceeds of the sale to his own customer (*i*). "Persons deal with the property in chattels or exercise acts of ownership over them at their peril" (*k*). So although a defamatory statement is not actionable if it is true, a mistaken belief in its truth, on whatever grounds it may be based, is commonly no defence. He who attacks another's reputation does so at his own peril (*l*). So a sheriff who by mistake in the execution of a writ seizes the goods of the wrong person or arrests the wrong person is just as responsible in an action for damages as if he had been guilty of a wilful wrong (*m*). And a

(*f*) Cp., however, a similar treatment by Seavey, 56 H. L. R. 85-7.

(*g*) Sir John Salmond explained (7th ed., pp. 12, 13) the cases of absolute liability as "being based on a conclusive presumption of negligence". But, as has been said, a conclusive presumption "is a rule of substantive law masquerading as a rule of evidence" (Williston in 24 H. L. R. 425. Cp. Thayer, Preliminary Treatise, ch. 8). Such an explanation, therefore, does not advance his case at all.

(*h*) *Infra*, ss. 25, 26.

(*i*) *Consolidated Co. v. Curtis*, [1893] 1 Q. B. 495.

(*k*) *Fowler v. Hollins* (1872), L. R. 7 Q. B. at p. 639.

(*l*) *Infra*, s. 105 (4).

(*m*) *Glasspoole v. Young* (1829), 9 B. & C. 696. Jeremiah Smith in 30 H. L. R. pp. 326-7, Harvard Essays, pp. 205-6, thinks that inevitable mistake other than mistake as to title will provide a good defence. Cp. Whittier, 15 H. L. R. 335.

man may be liable for pound-breach even although he has no knowledge of the pound (n).

4. *Special cases in which mistake a good defence.*—To this general principle of absolute liability for mistake the law recognises some exceptions, there being certain cases in which it would work such hardship or interfere so seriously with the exercise of lawful activities that it is necessary to relax it. Thus, for example, the mistaken prosecution of an innocent man is not in itself an actionable wrong; for such a rule would effectually impede the administration of the criminal law. A prosecutor incurs no liability unless he acted both maliciously and without reasonable cause (o). So the mistaken arrest of an innocent man on suspicion of felony is not actionable, if the felony has actually been committed, and if there is reasonable ground for believing that the person arrested is guilty of it (p). Mistake is always a defence where the plaintiff must prove malice (q).

5. *Inevitable accident.*—Inevitable mistake must be distinguished from inevitable accident. The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care. The plea of inevitable mistake, on the other hand, is that, although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstance existed which justified him. There is no general principle that inevitable accident is a good defence. It negatives the duty to take care which is the foundation of an action of negligence (r), but in actions of trespass it is probably only a defence where the defendant has no control over the act which caused the damage (s), and in actions under rules such as that in *Rylands v. Fletcher* only that special form of accident known as an act of God (or possibly the unforeseeable act of a third party) affords a good defence (t). We shall therefore deal with this defence in its various forms when we treat of specific torts; but a word may be said here of the meaning of the phrase "inevitable accident".

(n) *Lavill & Co. v. O'Leary*, [1933] 2 K. B. p. 217, *per* Lord Hanworth, M.R.

(o) *Eisee v. Smith* (1822), 1 Dowl. & Ry. 97.

(p) *Beckwith v. Philby* (1827), 6 B. & C. 635. *Vide infra*, s. 90 (13).

(q) *Infra*, s. 6 (4).

(r) Except in the case of statutory negligence, *infra*, ss. 135, 136.

(s) *Infra*, ss. 47 (3), 83 (5), 90 (15), 147 (3).

(t) *Infra*, ss. 142, 146 (8).

An accident in its popular sense is any unexpected injury resulting from any unlooked-for mishap or occurrence (u). In law a happening is only regarded as an accident "if it is one out of the ordinary course of things, something so unusual as not to be looked for by a person of ordinary prudence" (w). So an ordinary fall of snow is not an accident, but only an incident which happens in the ordinary course of things (x).

"But where injury is caused it is the happening to the person or the thing which is regarded as the accident rather than the cause of that happening. . . . A banana skin lying in the road is not an accident, but if it causes a man to slip and break his leg, that happening to the man is an accident" (y). One form of inevitable accident is that which is due to an act of God (z), another—from the point of view of the defendant—may possibly occur in the case of the unforeseeable act of a third party (a). In actions of negligence it is not necessary for the defendant to show that the accident was inevitable in the stricter sense—that is to say, incapable of being prevented at all. If a man drives a horse, and in spite of the exercise of all reasonable care on his part, an accident happens, he may plead that it was due to inevitable accident; and it will be no answer to this plea to prove that if he had altogether refrained from those dangerous forms of activity it would not have ensued (b).

### § 6. Malice

1. *Ambiguity of term malice.*—The term malice, as used in law, is ambiguous, and possesses two distinct meanings which require to be carefully distinguished. It signifies either (1) the intentional doing of a wrongful act, without just cause or excuse; or (2) action determined by an improper motive. To act maliciously means sometimes to do the act intentionally, while at other times it means to do the act from some wrong and improper motive, some motive of which the law disapproves. This motive need not be that of spite or ill-will—that is to say, it need not amount to malice in the narrow and popular sense of the term. Any motive is malicious in the second sense which is not recognised by law as a sufficient and proper one for the act in question.

(u) *Fenton v. Thorley & Co.*, [1903] A. C. p. 451.

(w) *Makin, Ltd. v. L. & N. E. Ry.*, [1943] 1 A. E. R. pp. 364–5.

(x) *Ibid.*; *Fenwick v. Schmalz* (1868), L. R. 3 C. P. p. 316, *per* Willes, J.

(y) *Makin, Ltd. v. L. & N. E. Ry.*, [1943] 1 A. E. R. p. 365, *per* Atkinson, J.

(z) *S.C.*, [1943] 1 K. B. 467, 475, 478. See Winfield, pp. 55–6.

(a) *S.C.*, [1943] 1 A. E. R. p. 367.

(b) *Cutler v. United Dairies*, [1933] 2 K. B. p. 305; *Fardon v. Harcourt-Rivington* (1932), 146 L. T. p. 392, *per* Lord Dunedin.



*First sense of the term.*—It is to malice in the first sense that the well-known definition given by Bayley, J., in *Bromage v. Prosser* (c) is exclusively applicable: "Malice in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse" (d).

Sir John Salmond (e) supported his theory of a general fault-basis for liability by defining "malice" in the legal as opposed to the popular sense as "wilful and conscious wrongdoing". "To act maliciously means . . . to do the act intentionally, with knowledge that it is wrongful." But the authorities set out by Sir John himself do not support this opinion. It seems that the "slippery word", as it was called by Lord Bowen, means in its technical sense nothing more than intention and an absence of excuse. The use of the term malice in this technical sense merely befogs the issue (f).

2. *Second sense of the term.*—Clearly to be distinguished from this first sense of the term malice is the second sense, in which it signifies the existence of an improper motive. Thus, malicious prosecution does not mean the intentional and wrongful prosecution of an innocent man; it means the prosecution inspired by an improper motive—a motive which the law does not allow and sanction: for example, the extortion of money (g). A prosecution so inspired may be actionable even though there was an honest belief in the guilt of the accused. Similarly, defamation which (even though honestly and on reasonable grounds believed to be true in fact and therefore not actionable) is inspired by malice, i.e., an improper motive, loses the protection which the law normally affords to defamatory statements made on occasions of qualified privilege (h).

3. *Motive commonly irrelevant.*—Save in such exceptional cases as those just mentioned, malice in the sense of improper motive is

(c) (1825), 4 B. & C. at p. 255.

(d) Cp. Bowen, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. p. 612: "Maliciously means and implies an intention to do an act which is wrongful to the detriment of another." So Lord Watson in *Allen v. Flood*, [1898] A. C. p. 94: "In order to constitute legal malice the act done must be wrongful . . . and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law."

(e) (7th ed.), pp. 16—17.

(f) Pollock, pp. 18—20.

(g) *Mitchell v. Jenkins* (1833), 5 B. & Ad. p. 595.

(h) "Acting maliciously means acting from a bad motive": *per* Parke, B., in *Brooke v. Rowl* (1819), 19 L. J. Ex. p. 115. For a full discussion of the cases by McCordie, J., see *Pratt v. British Medical Association*, [1919] 1 K. B. pp. 275—6, and *British Railway Traffic Co. v. C. R. C. Co.*, [1922] 2 K. B. pp. 267—71.

entirely irrelevant in the law of torts. The law in general asks merely what the defendant has done, not why he did it. A good motive is no justification for an act otherwise illegal, and a bad motive does not make wrongful an act otherwise legal. The rule is based partly on the danger of allowing such a tribunal as a jury to determine the liability of a defendant by reference to their own opinions and prejudices as to the propriety of his motives, and partly on the difficulty of ascertaining what those motives really were (i).

A leading case on this matter is *Mayor of Bradford v. Pickles* (k), in which the defendant was held not liable for intentionally intercepting, by means of excavations on his own land, the underground water that would otherwise have flowed into the adjoining reservoir of the plaintiffs, although his sole motive in so doing was to coerce the plaintiffs to buy his land at his own price. It was already settled law that the interception of underground water is not an actionable wrong, even though done intentionally (l), but in the present case an attempt was made to establish an exception to this rule when the damage was caused not merely intentionally but maliciously. This contention, however, was rejected by the House of Lords. Lord Watson says (m): "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious". Lord Macnaghten speaks to the same effect (n): "In such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act apart from the motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element". The same principle was again formulated by the House of Lords in the later case of *Allen v. Flood*! Lord Watson there says (o): "Although

(i) Cp. *Allen v. Flood*, [1898] A. C., at pp. 118-9, *per* Lord Herschell; at p. 153, *per* Lord Macnaghten.

(k) [1895] A. C. 587.

(l) *Chasemore v. Richards* (1859), 7 H. & L. C. 349. Strangely enough in *Mayor of Bradford v. Pickles* the rights arising from the pollution of the water, though clearly established, were not discussed at all; see Winfield, p. 489 n. (t).

(m) [1895] A. C. p. 598.

(n) *Ibid.* p. 601.

(o) [1898] A. C. p. 92. For a criticism of these *dicta*, see Ames in 18 H. L. R. 411, Lectures, 399, Harvard Essays, 150. Dr. Glanville Williams (7 Camb. L. J. pp. 126-31) kicks against the pricks. He regards these *dicta* as regrettable and unnecessary and would confine the effect of the decision in *Mayor of Bradford's Case* within very narrow limits. But Lord Wright in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A. C. pp. 466, 468, 472, says that the rule, whatever its moral or logical or sociological justification, is well established in English law. Cp. Friedmann, 21 Can. Bar Rev. pp. 372-3; Legal Theory, pp. 323-5. See also *Davis v. Bromley Corporation*, [1908] 1 K. B. 170.

the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong".

"Our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism. . . . The possibility that a legal right may be exercised with impunity in a spirit of malevolence or selfishness is one of the unsatisfactory features of our law, and there would appear to be a *prima facie* case for reform in this direction, a belief which is strengthened by the fact that ours is the only modern system which has not endeavoured to evolve some means by which it may be ensured that a rule of law shall not be transformed into an instrument for the gratification of private spite or the promotion of chicanery" (p).

4. *Special cases in which motive is relevant.*—There are certain exceptions to the general principle that motive or malice is immaterial in the law of torts—most of which obtained firm establishment in the law before the general doctrine had received express recognition. The chief of these exceptional cases are the wrongs of defamation on a privileged occasion, malicious prosecution, and injurious falsehood (q) (r). More recently a purpose approved by the law has been recognised as providing a good justification for combinations otherwise wrongful and for inducement of breach of contract (s).

5. *Necessity as a defence.*—In some cases even damage intentionally done may not involve the defendant in liability where he is acting under necessity to prevent a greater evil. There is not a great deal of authority on this branch of the law. In a case of 1507 (t) Kingsmill, J., admitted that it was a justification for the violation of another man's rights that the act was necessary to the commonweal, as in case of fire to take goods out of a house to save

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(p) Dr. Gutteridge, "Abuse of Rights", in 5 Camb. L. J. 22 (a most instructive comparison of the Common Law with French, German, Swiss and Soviet law on this topic). See also F. H. Lawson in J. C. L., Nov., 1940, pp. 161-5. Seavey has noticed (56 H. L. R. p. 95) in America a growing tendency, not yet ripened into a principle, to increase the area of liability for acts done with the sole purpose of causing harm to others. See also Allen, Legal Duties, pp. 95 *sqq.*

(q) *Vide infra*, ss. 108, 151, 153, 156, 159. As to nuisance, *vide infra* s. 55 (7).

(r) Sir John Salmond wrote a long note on the history of the meaning of malice: (8th ed.), pp. 31-2.

(s) *Infra*, ss. 96 (4), 156 (4) and (5).

(t) Y. B. 21 Hen. VII. fo. 27, pl. 5. This statement of the law was approved in *Maleverer v. Spinke* (1598), Dyer 36 b. But it is not permissible for the driver of a fire-engine to ignore traffic signals: *Ward v. L. C. C.*, [1938] 2 A. E. R. 341.

them, to pull down a house to save other houses, and in time of war to enter another man's land to make a bulwark in defence of the King and the realm. In *Kirk v. Gregory* (u) it was held that it is a defence that the act was done for the preservation or protection of the property of the person whose rights were violated if there was a reasonable necessity for the act. Sometimes also the necessity of protecting your own rights may justify you in violating the rights of another if the danger is imminent and your act is reasonably necessary for the averting of that danger. So in *Cope v. Sharpe* (v) it was held that you might be justified in burning your neighbour's heather in order to prevent a heath-fire spreading to your own sitting pheasants. The test of reasonable necessity in such cases is based upon the state of things at the moment at which the act in question took place, and not upon the inference as to necessity to be drawn from the event (w). Analogous is the well-recognised right of a passenger upon a highway, if it is foundrous, to go upon the adjoining land (x) (y).

### § 7. Negligence

1. *Negligence and wrongful intent distinguished.*—In the law of torts negligence has two meanings: (1) an independent tort, with which we shall deal in its place; (2) a mode of committing some other torts (z). It is with the latter that we are now concerned. In this latter sense negligence is carelessness. In some cases either negligence or wrongful intent is required by law as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and therefore does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care—who is not anxious or not

(u) (1876), 1 Ex. D. 55.

(v) [1912] 1 K. B. 496.

(w) *Cope v. Sharpe*, [1912] 1 K. B. at p. 507, per Kennedy, L.J.

(x) *Henn's Case* (1638). Sir W. Jones, 296; *The Carlgarth*, [1927] P. p. 107, per Scrutton, L.J. Contrast *Gilbert v. Stone* (1647). Al. 35. Winfield, p. 64, n. (x), doubts this example.

(y) On the whole subject, see Pollock, pp. 132-4; Bohlen in 39 H. L. R. pp. 307-24, *Studies*, pp. 614-35.

(z) Winfield in 42 L. Q. R. p. 196; 4 Camb. L. J. p. 197; 34 Col. L. R. 41 sqq. Sir John Salmond apparently did not recognise negligence as an independent tort

sufficiently anxious that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot also have caused it negligently, and *vice versa* (a).

2. *Negligence and inadvertence*.—Negligence is usually accompanied by inadvertence, but it is not the same thing, and this coincidence is not invariable. Carelessness as to possible consequences very often results in a failure to bring those consequences to mind—i.e., inadvertence. Commonly, therefore, the careless person not only does not intend the consequence, but does not even advert to it; its possibility or probability does not occur to his mind. But this is not always so, for there is such a thing as wilful—i.e., conscious and advertent—negligence. The wrongdoer may not desire or intend the consequence, but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm, but he intentionally and consciously exposes others to the risk of it. Eve, J., has described (b) this as “an attitude of mental indifference to obvious risks”. He who throws a stone over a wall into the street, and so hurts a passer-by, may have been perfectly conscious of the danger which he was thus causing, and yet so careless of others’ rights and interests that he was content to risk the happening of an accident. Yet this recklessness, as it may be called, is so different in quality from inadvertence that Austin (c) included it within the term Intention. But legal usage has not followed him and it is generally said that whether he did or did not advert to the danger, such a person was guilty merely of negligence, and not of wilful harm. There is no wilful harm unless he not merely adverted to the possible consequence, but did the act in order that that consequence should happen.

3. *Negligence and want of skill*.—It is commonly said that want of skill amounts to negligence (d). *Imperitia culpaæ adnum-*

(a) Negligence is defined by Willes, J., in *Grill v. General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 612, as “the absence of such care as it was the duty of the defendant to use”. “Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design”: *Kettlewell v. Watson* (1882), 21 Ch. D. at p. 706, *per* Fry, J.

(b) *Hudston v. Viney*, [1921] 1 Ch. at p. 104.

(c) *Jurisprudence* (4th ed.), Vol. I, pp. 436, 441-2. See Turner in 5 Camb. L. J. pp. 63-6.

(d) *Heaven v. Pender* (1883), 11 Q. B. D. p. 507, *per* Brett, M.R.

*eratur* (e),<sup>1</sup> said the Romans. This is true in the sense that it is commonly a negligent act voluntarily to undertake the doing of any act which can be safely done only through the possession of special skill, unless the doer possesses or believes on reasonable grounds that he possesses the requisite skill (f). The negligence does not in reality consist in the lack of skill, but in undertaking the work without skill. No one is bound by law to be a skilful and competent driver of horses, but every one is bound not to drive horses unless he is skilful and competent (g).

The same principle applies to the lack of any other qualification for the safe conduct of an operation, such as knowledge, sound judgment, sound health, physical strength, or the possession of any other requisite mental or bodily faculty. No man is to blame because fate has denied him good sense, or a retentive memory, or a quick apprehension, or sound eyesight; these defects are in themselves mere misfortunes for which he is no more accountable in law than in justice; but if, lacking those qualities, and having reasonable means of knowing that he lacks them, he enters on activities which demand the possession of them, he is guilty of negligence and liable for damage so resulting (h).

If, however, a person thus deficient in some attribute of the ordinary and average man is placed without his own choice in some situation where the possession of that attribute is requisite for the avoidance of harm, he is not responsible for negligence merely because the ordinary man could have avoided the accident. He must be judged with reference to his own capacities of mind and body, and if he does his best, he does enough, even though a man better endowed would have been bound to do much more. A blind man must not voluntarily do an act which can be safely done only by those who have eyes to see, but if he has such action thrust upon him through no choice of his, he will not be judged as though he could see.

### § 8. *Volenti non fit injuria*

1. *Consent as excluding civil liability.*—No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: *Volenti non fit injuria*. No man can enforce a right

(e) D. 50. 17. 132.

(f) *Seare v. Prentice* (1807), 8 East 318. Barristers are an exception: *Fell v. Brown* (1791), 1 Peake 96. See Winfield, 445.

(g) For illustrations of this principle, *vide infra*, s. 121 (6).

(h) *Paul v. G. E. Ry.* (1920), 36 T. L. R. 344.

which he has voluntarily waived or abandoned (i). This maxim has a double application. It applies, in the first place, to intentional acts which would otherwise be tortious: consent, for example, to an entry on land or goods (k) which would otherwise be a trespass, consent to physical harm which would otherwise be an assault, as in the case of a boxing match or a surgical operation (l), or consent to the publication of a defamatory statement which would otherwise be actionable (m). The maxim applies, in the second place, to consent to run the risk of unintentional harm. Thus consent may deprive a plaintiff of a right of action in trespass which he would otherwise have had for an injury inflicted accidentally. So spectators at cricket, football, hockey, and polo matches, at motor race and flying meetings take upon themselves the risk of such perils as may reasonably be expected to occur at such meetings as well as the risk of improbable accidents (n). So again he who goes upon a golf-course, whether as player, caddie or spectator, takes upon himself the risk of harm from the dangers naturally incidental to presence on a golf-course (o), but not the risk of injury by the negligent acts of other persons playing there (p).

2. *Accidents on highway*.—One very important application of the principle that a man cannot recover damages if he has consented to run the risk of accidental harm is to be found in the case of accidents on the highway. In *Holmes v. Mather* (q) the plaintiff was knocked down on the highway by the defendant's horses which were being driven with all proper care. The defendant was held not liable, and Bramwell, B., said (r): "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid". In other words, he who uses a highway consents to run the risk of pure accidents, but not the risk of injury due to other persons' carelessness. It is for this reason that in such cases although the injury is direct and forcible

(i) These words were cited with approval by Slessor, L.J., in *Chapman v. Ellesmere*, [1932] 2 K. B. p. 463.

(k) *Leitch v. Leydon*, [1931] A. C. p. 109.

(l) *R. v. Donovan*, [1934] 2 K. B. pp. 508-9.

(m) *Chapman v. Lord Ellesmere*, [1932] 2 K. B. 431.

(n) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. 206. For a discussion of the case see 9th ed., s. 8 (1), n. (f).

(o) *Potter v. Carlisle and Cliftonville Golf Club*, [1939] N. I. 114.

(p) *Cleghorn v. Oldham* (1927), 43 T. L. R. 466.

(q) (1875), L. R. 10 Ex. 261.

(r) At p. 267. *Vide infra*, s. 57 (2).

and therefore *prima facie* a trespass to the person the plaintiff has to prove negligence in order to succeed.

The same principle is extended to those who own property adjoining a highway. Such property owners must submit to the dangers incident to the ordinary use of the highway for purposes of traffic, so long as they are not aggravated by the negligence of him whom they seek to make liable for them (s). So in *Tillett v. Ward* (t) the defendant drove cattle along the highway, and was held not liable for damage done by the entrance of an ox through the open doorway of the plaintiff's shop. So also it has been said that those going to a market must take the ordinary risks of escaping beasts (u) (x).

3. *Consent to negligence.*—It has been said that the maxim does not apply where there is negligence (y). In one sense this is clearly true. The duty to take care which is necessary to found an action of negligence (z) is negated by the plaintiff's consent. "The plea *volenti* is a denial of any duty at all" (a). But it would seem that one may consent to take the risk of harm through another person's carelessness. In such a case, as Sir John Salmond said, the consent is the agreement of the plaintiff, express or implied, to exempt the defendant from the duty of care which he otherwise would have owed. Asquith, J., considered the question in *Dann v. Hamilton* (b). In that case the plaintiff, who voluntarily chose to

(s) *Per* Lord Blackburn in *Fletcher v. Rylands* (1866), L. R. 1 Ex. pp. 266-7, and in *River Wear Commissioners v. Adamson* (1877), 2 A. C. p. 767.

(t) (1882), 10 Q. B. D. 17. See the elaborate discussion of this case by McCaig, J., in *Gayler and Pope v. Davies*, [1924] 2 K. B. 75, and Winfield and Goodhart in 49 L. Q. R. pp. 368 *sqq.* See also Winfield, pp. 228-31, and R. O'Sullivan in 2 Mod. L. R. p. 89. Williams, *Animals*, pp. 369-76, states that non-liability for the trespass of cattle escaping from a highway is an instance of inevitable accident as a defence, and therefore that there is no liability however far such cattle wander from the highway. If the view adopted above is correct, the defence would only be available against those whose land is sufficiently near to the highway to justify the inference that they have accepted the risk of such an escape. *Vide infra*, s. 147 (3).

(u) *Brackenborough v. Spalding* U. D. C., [1942] A. C. p. 330, *per* Lord Porter. See further as to nuisances in a highway, ss. 57, 69, *infra*.

(x) For applications of the doctrine of *volenti non fit injuria* in special cases, *vide infra*, ss. 114, 139.

(y) Beven, p. 796; Pollock, p. 131. *Cp.* Lord Bramwell in *Smith v. Baker*, [1891] A. C. p. 344; Swift, J., in *Cleghorn v. Oldham* (1927), 43 T. L. R. p. 467. (Swift, J., however, recognised that there might be an express agreement to assume the risk of negligence.)

(z) *Infra*, s. 120.

(a) *Dann v. Hamilton*, [1939] 1 K. B. p. 512. Beven, p. 796, n (u), puts it in another way: "Negligence is the failure to bestow the care and skill which the situation demands; therefore, if the situation does not demand it, it is not negligence to omit what is not demanded."

(b) [1939] 1 K. B. 509, pp. 517-8.



travel by motor car though she knew the driver was under the influence of drink and though she could have made her journey by omnibus, was injured in an accident caused by the driver's drunkenness. The learned Judge, in giving judgment for the plaintiff, said that the maxim had often been held to apply where a dangerous physical condition had been brought about by the negligence of the defendant, and, after it had arisen, the plaintiff, fully appreciating its dangerous character, had elected to assume the risk (c), but thought the case might well be different where the act relied on as a consent preceded a possible subsequent act of negligence and was claimed as a licence in advance. "A passenger is not deprived of his remedy if he travels with a driver who is known to have driven negligently in the past. Similarly he should not be without remedy if he travels with a driver known to be under the influence of drink, though it might be otherwise if the drunkenness of the driver is "so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff" (d). *h*

It is submitted that the true question in every case is: did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care? Whether such a consent has in fact been given is a question of fact for the jury, not of law for the Judge (e). The issue has been clouded by the fact that many of the cases in which the maxim has been considered have been cases of master and servant where special considerations apply. Some of them have turned upon the interpretation of the Employers' Liability Act, 1880 (f), others upon an implied term in the contract of employment, a term which it is for the Court and not for the jury to imply (g). "A servant is seldom *volens* to an *injuria*. If he is engaged in an inherently dangerous occupation it must be rare that

(c) Cp. the "rescue" cases, *infra*, s. 8 (5).

(d) Possibly the plaintiff could have succeeded on the ground that her consent to the criminal act of driving under the influence of drink was void, but Asquith, J., was doubtful of this (at p. 519), and *vide infra*, s. 8 (4). The case is criticised by Goodhart, 55 L. Q. R. 184.

(e) Beven, pp. 794-5, Winfield, p. 37; *infra*, s. 8 (7), n. (b). But see doubts expressed by Swift, J., in *Cleghorn v. Oldham* (1927), 43 T. L. R. p. 467.

(f) See 55 L. Q. R. p. 187.

(g) *Vide infra*, s. 28. Cp. Asquith, J., in *Dann v. Hamilton*, *supra*, p. 515. Where an absolute statutory duty is imposed, e.g., upon a master to fence a dangerous machine, it is no defence to say that the servant knew the danger and took the risk. *Vide infra*, s. 186 (2).

the harm done him is due to the negligence of the master: there is no *injuria* if he is not. In other occupations the servant is hardly ever *volens* if he is injured" (gg).

4. *Consent to a criminal act.*—If an act is in itself a criminal act it does not cease to be criminal because the person to whose detriment it is done consents to it. "No person can license another to commit a crime" (h). Thus no person can lawfully consent to his own death, so that killing a man in a duel is murder. Nor can any one lawfully consent to bodily harm, save for some reasonable purpose: for example, a proper surgical operation or manly sports (i). It has never been decided whether consent in such cases is a good defence in a civil action, but it is submitted that on principle it ought to be. If two men injure each other in a prize fight, they may be prosecuted criminally; but it is difficult to suppose that either of them has a good cause of action against the other (k).

5. *Reality of consent.*—The consent must be a real consent. Consent obtained by threats or other duress is no real consent, nor is consent obtained by fraud (l). Again, a man cannot be said to give a real consent if he acts under the compulsion of a legal duty. Thus it is the duty of a servant to protect his master's

(gg) *Bowater v. Rowley Regis Corporation*, [1944] K. B. 476; *Read v. Lyons & Co.* (1944), 170 L. T. 418; in C. A., 61 T. L. R. 148. See also 60 L. Q. R. pp. 211-2.

(h) *R. v. Donovan*, [1934] 2 K. B. at p. 507. There are of course acts which are only criminal if done without the consent of the person affected.

(i) *R. v. Donovan*, [1934] 2 K. B. 498; *R. v. Coney* (1882), 8 Q. B. D. 534. See Binney, *The Law as to Sterilization*.

(k) In *Matthew v. Ollerton* (1694), Comb. 218, the Court of King's Bench said obiter that "licence to beat me is void, because 'tis against the Peace". At that time trespass still, at any rate in theory, involved a fine to the Crown. Consent could not bar a criminal proceeding. But by an Act of 1694 the fine was abolished. Thereafter there was no reason for giving a right of action to a consenting party. There are two fundamental principles: *Volenti non fit injuria* and *Ex turpi causa non oritur actio*. Each alike negatives the right of a person to bring an action for damages caused by a criminal act to which he has consented: Bohnen, *Studies*, 577. Pollock, p. 126, takes a different view. Hawkins, J., in *R. v. Coney* (1882), 8 Q. B. D. p. 553, had doubts. Winfield, *Province*, pp. 86-91, considers the question in detail and suggests that the true principle is that "the plaintiff can sue and recover damages, unless allowing him to do so would be against public policy in general, or would be the condonation of a breach of public morals or public safety in particular". Cp. his *Torts*, pp. 29-32. But see Green, *Judge and Jury*, pp. 324-9.

(l) On this see Winfield, pp. 34-6. *Hegarty v. Shine* (1878), 14 Cox 124, 145, there referred to, was probably rightly decided on the ground that *ex turpi causa non oritur actio*, but the *dicta* as to consent obtained by fraud in civil actions are open to doubt. *Palles, C.B.*, held (at p. 149) that the plaintiff by consenting to intercourse consented to infection with venereal disease. This is disputable. A man who consents to run the risks incurred in playing a violent game does not consent to the added danger of playing it on a highly polished floor: *Gillmore v. L. C. C.*, [1938] 4 A. B. R. p. 486.

premises from fire. If in so doing he runs risks he is not a volunteer, and, if he is injured, he will have a remedy against him whose negligence caused the fire (m). "A man cannot be said to be 'willing' unless he is in a position to choose freely"; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will (mm).

*Rescue cases.*—The so-called "rescue" cases suggest that the same principle applies if the plaintiff has acted under a moral duty. In *Haynes v. Harwood* (n) the Court of Appeal laid it down that "the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty" (o). In that case the defendants' servant had left his van and horses unattended in a crowded street. The horses bolted when a boy threw a stone at them. The plaintiff was a police constable on duty inside a police station; he saw that if nothing was done a woman and children were in grave danger, and at great personal risk managed to stop both horses, but in so doing suffered serious personal injuries. He was entitled to damages. It has more recently been held that the result is the same when the plaintiff is under no legal duty to effect the rescue (p). It would seem therefore that the compulsion of a moral, no less than a legal, duty negatives the reality of the consent, and there seems no reason why the principle should be limited to "rescue" cases or to the protection of persons, not property (q). But not even every rescuer will have a remedy. In deciding whether "a rescuer is justified in putting himself into a position of such great peril, the law has to measure the interests which he sought to protect and the other interests involved" (r). So that

(m) *D'Urso v. Sanson*, [1939] 4 A. E. R. 26. Cp. *The Gusty*, [1940] P. 159 (a collision at sea).

(mm) *Bowater v. Rowley Regis Corporation*, [1944] K. B. p. 479, per Scott, L.J.

(n) [1935] 1 K. B. 146. See on this case Winfield, pp. 40-1.

(o) Per Greer, L.J., at p. 157, citing the language of Goodhart in his "Rescue and Voluntary Assumption of Risk", 5 Camb. L. J. 162, at p. 196. The case is an interesting illustration of the occasional influence even in England of academic work and of American case law.

(p) *Morgan v. Ayles*, [1942] 1 A. E. R. 189. Left open in *Haynes v. Harwood*.

(q) *Steel v. Glasgow Iron Co.*, [1944] S. C. 237. See Goodhart in 61 L. Q. R. 27. Cp. *D'Urso v. Sanson*, *supra*, at p. 29 (point left open).

(r) Per Maugham, L.J., in *Haynes v. Harwood*, *supra*, at p. 162.

if a person rushed out to stop a horse bolting on a desolate country highway and was injured he would probably have no remedy (s). The defendant will only be liable if he could reasonably have been taken to have foreseen the possibility of the plaintiff's act (t).

In rescue cases it matters not whether the plaintiff acted deliberately from a sense of moral duty or on impulse. In neither case is there a true consent, in the former because he is acting under the compulsion of the duty, in the latter because he has not exercised a choice in acting as he did (u) (v).

6. *Knowledge distinguished from consent.*—Mere knowledge of an impending wrongful act, or of the existence of a wrongfully caused danger, does not in itself amount to consent, even though no attempt is made by the plaintiff to prevent or avoid that act or danger. Consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. The maxim of the law is *Volenti non fit injuria*, not *Scienti non fit injuria* (w). Thus, the occupier of land is not precluded from suing for a nuisance on the adjoining property by the fact that he well knew, when he went there, that the nuisance already existed (x).

7. *Knowledge as evidence of consent.*—The same principle applies to the other branch of the maxim *Volenti non fit injuria*, relating to the consent to run the risk of accidental harm. But a man must be presumed to know the ordinary consequences of his action, and if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head (y). In cases under the Employers' Liability Act, 1880, a servant who knowingly works on dangerous premises or with defective plant or tools is not for that reason *ipso facto* debarred from suing his employer when an accident happens. The question is not whether he knew of the danger, but whether in fact he agreed to run the risk, in the sense that he exempted his employer from his

(s) *S.C.* at pp. 160, 165.

(t) *Cp. Bourhill v. Young*, [1943] A. C. 92. *Infra*, s. 121 (3).

(u) *Cp. infra*, ss. 34 (27), 124 (10).

(v) See also *Chester v. Waverley Municipal Council* (1939), 62 C. L. R. 1, and especially the elaborate dissenting judgment of Evatt, J. Goodhart, 58 L. Q. R. 300, discusses the position if the person rescued has been guilty of contributory negligence. The answer to his problems seems to lie in the correct application of the principles of contributory negligence as set out *infra*. Chapter XIV.

(w) *Per* Bowen, L.J., in *Thomas v. Quartermaine* (1887), 18 Q. B. D. p. 696.

(x) *Elliotson v. Feetham* (1895), 2 Bing. N. C. 134.

(y) *Butler v. United Dairies*, [1933] 2 K. B. p. 303, *per* Scrutton, L.J.

duty not to create the danger, and agreed to take the chance of an accident. Knowledge of the danger may be evidence of such an agreement, but it is nothing more. This principle was finally established by the House of Lords in the leading case of *Smith v. Baker* (z). The plaintiff was employed in the defendants' stone quarry, and had worked there for months with full knowledge of the fact that he was exposed to danger by reason of the negligent practice of the defendants in swinging stones over the quarrymen's heads by means of a crane. The plaintiff having been injured by the fall of a stone, it was held that he was not, by reason of his knowledge of the danger and his acquiescence in it, *ipso facto* deprived of an action against the defendants, but that such knowledge and acquiescence were merely evidence for a jury on the question whether he had agreed with the defendants to take the risk of such an accident upon himself. A similar decision had previously been given by the Court of Appeal in *Yarmouth v. France* (a), where the plaintiff, a carter in the defendant's service, had notwithstanding his remonstrances been required by the defendant's foreman to drive a horse which, to the knowledge of both, was so vicious as to be unfit for the purpose (b).

8. *Other effects of knowledge.*—Knowledge of the danger, even if it does not prove an agreement to take the risk within the rule in *Smith v. Baker*, may nevertheless be a bar to the plaintiff's action for two other reasons:—

- (a) It may negative the existence of any negligence on the part of the defendant in causing that danger;
- (b) It may establish the existence of contributory negligence on the part of the plaintiff.

In the first place, there are certain cases in which he who causes a danger fulfils all his legal duty of care by giving notice of that danger to the persons whom it affects. Thus, he who lends a chattel gratuitously to another is not bound to do anything more than

(z) [1891] A. C. 325.

(a) (1887), 19 Q. B. D. 647.

(b) See also *Clarke v. Holmes* (1862), 7 H. & N. 937; *Williams v. Birmingham Battery Co.*, [1899] 2 Q. B. 338; *Taylor v. Sims* (1942), 167 L. T. 414 (workman employed in repairing bombed houses). *Thomas v. Quartermaine* (1887), 18 Q. B. D. 685, must, since *Smith v. Baker*, be taken to have been wrongly decided. For in that case the Court of Appeal decided for themselves as a matter of law that the plaintiff (who was scalded by falling into a vat which to his knowledge was left unguarded) was deprived of any cause of action because *Volenti non fit injuria*. See the disapproval of *Thomas v. Quartermaine* expressed in *Smith v. Baker* by Lord Herschell, [1891] A. C. p. 365. For a full discussion of all these cases, see Bohlen in 20 H. L. R. 91, *Studies*, 467, *Harvard Essays*, 518.

disclose the existence of any dangerous quality of which he actually knows and of which the borrower does not know (c). In all such cases, therefore, it is an absolute defence that the plaintiff had actual knowledge of the danger which caused his injury: here *scienti non fit injuria* (d).

In the second place, there are cases in which the act of the plaintiff in knowingly running a risk created by the defendant's wrongful act amounts to contributory negligence on his own part, and is so a bar to any action. Whether it does so or not depends on whether the conduct of the plaintiff was reasonable, having regard to the magnitude of the risk and the urgency of the occasion. A certain amount of risk I am entitled to face, even with full knowledge, rather than submit to be deprived of my liberty of action by the wrongful act of another; and if an accident happens, I can hold him accountable who wrongfully created the danger. But if the danger is so great that it is a foolhardy and unreasonable act to expose myself to it, I do so at my own cost. In *Clayards v. Dethick* (e) the plaintiff, a cab-driver, occupied certain stables, and the defendant wrongfully dug a trench along the passage which afforded the only outlet from the stables to the street. The plaintiff attempted to lead out two of his horses along the passage and over the heaps of soil which the defendant had excavated, and while doing so one of the horses fell into the trench and was injured. It was held that the defendant was liable; for the plaintiff was not bound to submit to be thus deprived of the use of his stables, and was entitled knowingly to face the danger thus created, and to cast all responsibility for the issue upon the wrongdoer. "The whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt" (f).

It is clear that no risk, however great, can be made the ground of a charge of contributory negligence if the defendant himself requested or ordered or authorised the act of the plaintiff in running

(c) *Coughlin v. Gillison*, [1891] 1 Q. B. 145.

(d) Cp. *Gilmour v. Glasgow Commissioners* (1898), 150 L. T. 68.

(e) (1848), 12 Q. B. 437. This case has been criticised without sufficient reason, see Winfield, p. 467.

(f) 12 Q. B., p. 446. See also cases where the plaintiff has a statutory right to protection or a common or individual right at law to find the premises or appliances free from danger, e.g., a market or fair: *Lax v. Darlington Corporation* (1878), 5 Ex. D. 28. See Bowen, L.J., in *Thomas v. Quartermaine* (1887), 18 Q. B. D. pp. 696-7. Cp. *Thruswell v. Handyside* (1888), 20 Q. B. D. 359; *Robson v. N. E. Ry.* (1875), L. R. 10 Q. B. 271; *Rose v. N. E. Ry.* (1876), 2 Ex. D. 248. Cp. also the case of the man who comes to a nuisance, *infra*, s. 55 (1), and see Böhlen, *Studies*, pp. 447-57. *Harvard Essays*, pp. 501-9, 20 H. L. R. pp. 18-26. See also *infra*, s. 128 (4) and (5).

the risk. It may have been a foolhardy act of the plaintiff in *Yarmouth v. France* (g) to drive the horse that did the mischief, but this defence was not open to the defendant (h).

9. *Summary*.—The maxim *Volenti non fit injuria* is in its strict and proper application limited to the case of an express or implied agreement to suffer harm or to run the risk of it. In this sense the maxim has no affinity with the doctrine of contributory negligence. "Carelessness is not the same thing as deliberate choice, and the Latin maxim often applies where there has been no carelessness at all" (i). In a wider and less accurate sense, however, it is also used to include the operation of mere knowledge in excluding an action in accordance with the principles already mentioned. So that in this wide sense we may say that the maxim covers three distinct classes of cases:—

- (a) Those in which the plaintiff has agreed expressly or impliedly to suffer harm or to run the risk of it;
- (b) Those in which, because the plaintiff knows of the danger, the defendant has done no wrong in causing it;
- (c) Those in which, because the plaintiff knows of the danger, his act in voluntarily exposing himself to it is an act of contributory negligence, and so deprives him of an action.

But there is, properly speaking, a difference between the defences of contributory negligence and *volenti non fit injuria* even when used in this wider sense. In the case of contributory negligence an essential cause of the accident is the negligence of the plaintiff himself, which is a further cause intervening between the acts of the defendant and the damage done. That is not the case where the doctrine of *volenti non fit injuria* applies (k) (l).

### § 9. Statutory Authority

1. *Statutory authority*.—When a statute specially authorises a certain act to be done by a certain person, which would otherwise be unlawful and actionable, no action will lie at the suit of any

(g) (1889), 19 Q. B. D. 647. For facts *vide supra*, s. 8 (7).

(h) *Cp. Murray v. Schwachman, Ltd.*, [1938] 1 K. B. 130.

(i) *Per* Bowen, L.J., in *Thomas v. Quartermaine* (1887), 18 Q. B. D. p. 697.

(k) *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. p. 695, *per* Slesser, L.J. See also *infra*, s. 124 (6).

(l) A full discussion of all these questions will be found in three papers by Bohlen: "Voluntary Assumption of Risk", 20 H. L. R. 14, 91, *Harvard Essays*, 497, *Studies*, 441; "Consent as affecting Civil Liability for Breaches of the Peace", *Studies*, 577; "Contributory Negligence", 21 H. L. R. 233, *Harvard Essays*, 469, *Studies*, 500. See also Green, *Judge and Jury*, pp. 114–5; Goodhart in 5 *Camb. L. J.* 192.

person for the doing of that act. For such a statutory authority is also a statutory indemnity, taking away all legal remedies provided by the law of torts for persons injuriously affected. No compensation is obtainable save that, if any, which is expressly provided by the statute itself (m). This defence of statutory authority has its most common and important applications in actions of nuisance, but the rule is one of general application throughout the whole sphere of civil liability.

2. *Statutory authority covers all necessary consequences of act authorised.*—This statutory authority and indemnity extends not merely to the act itself, but to all its necessary consequences. When the Legislature has authorised an act, it must be deemed also to have authorised by implication all inevitable results of that act; for otherwise the authority to do the act would be nugatory (n). The test of the necessity of a consequence is the impossibility of avoiding it by the exercise of due care and skill. No consequence which can be so avoided is within the scope of the statutory indemnity; every consequence which cannot be so avoided is within that protection. "It is now thoroughly well established", says Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (o), "that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised, if it be done negligently (p). And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, negligence not to make such reasonable exercise of their powers." If there is a choice between exercising a power in a manner hurtful or in a manner innocuous to third parties, it is negligence to choose the former (q).

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(m) *Vide infra*, s. 143 (2).

(n) *Quebec Ry. v. Vandry*, [1920] A. C. 662, 680: "That which is necessarily incidental to the exercise of the statutory authority is held to have been authorised by implication." Cp. *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. 226; *Farnworth v. Manchester Corporation*. [1929] 1 K. B. p. 561; Street, *Ultra Vires*, pp. 282-90.

(o) (1878), 3 App. Cas. 430, p. 455.

(p) "The expression in the cases is 'negligence', which is hardly the appropriate word": *Biscoe v. G. E. Ry.* (1878), 16 Eq. p. 640, *per Wickens*, V.-C. Cp. *Provender Millers v. Southampton C. C.*, [1910] Ch. p. 140, *per Farwell*, J. And see *East Suffolk Catchment Board v. Kent*, [1941] A. C., pp. 86-7, *per Lord Simon*, L.C.

(q) *Lagan Navigation Co. Case*, *supra*, p. 243, *per Lord Atkinson*. It is otherwise if the defendants are authorised to do specific acts under an Act of Parlia



"The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible, but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense" (r).

Thus in *Vaughan v. Taff Vale Ry.* (s) the defendant company, having statutory authority to use locomotive steam-engines, was held not liable for a fire caused by an escape of sparks, it being proved that the engines were constructed with all due care and skill, and that it was impossible wholly to prevent the escape of sparks. At common law it would have been an actionable nuisance to use engines which were a source of danger; and it would have been no defence that they had been made as safe as they could be (t). Similar statutory protection is possessed by railway and other public utility companies in respect of the various other nuisances which are necessarily incidental to the management of their business—e.g., noise and vibration (u) (x).

3. *Absolute and conditional authority.*—It is very necessary, however, in the application of the foregoing rule to distinguish between absolute and conditional statutory authority. Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or other injurious consequence. This

ment and given an absolute right to choose which act they will do: *Robins & Son v. Minister of Health*, [1939] 1 K. B. 520. Cp. *Dormer v. Newcastle-upon-Tyne Corporation*, [1940] 2 K. B. 204.

(r) *Manchester Corporation v. Farnworth*, [1930] A. C. p. 183, per Lord Dunedin. Cp. Lord Sumner at pp. 199-201. See *Provender Millers v. Southampton C. C.*, [1940] Ch. pp. 136-40, 156.

(s) (1860), 5 H. & N. 679. The effect of this decision has been partly excluded by the Railway Fires Acts, 1905 and 1923, which provide that railway companies shall be liable, notwithstanding their statutory authority, to the extent of two hundred pounds at the most, for damage done to agricultural land or crops by the escape of sparks or cinders from locomotive engines. See *Martin v. Gt. Eastern Ry.*, [1912] 2 K. B. 406. An action will lie under the Acts for £200, even if the total damage done be much in excess: *Att.-Gen. v. G. W. Ry.*, [1924] 2 K. B. 1.

(t) *Jones v. Festiniog Ry.* (1868), L. R. 3 Q. B. 733; *infra*, s. 144 (6).

(u) *Hammersmith Ry. v. Brand* (1869), L. R. 4 H. L. 171; *London, Brighton, etc. Ry. v. Truman* (1885), 11 App. Cas. 45; *Att.-Gen. v. Metropolitan Ry.*, [1894] 1 Q. B. 384.

(x) See also *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, [1902] A. C. 381; *National Telephone Co. v. Baker*, [1899] 2 Ch. 186.

condition is, sometimes expressed (y), but is more often left to be implied from the general provisions of the statute. In *Metropolitan Asylum District v. Hill* (z) a local authority, having statutory authority to erect a smallpox hospital, was restrained from erecting one in a place in which it would have been a source of danger to the residents of the neighbourhood. This statutory authority was construed, not as an absolute authority to erect a hospital where the defendants pleased, and whether a nuisance was thereby created or not, but as a conditional authority to erect one if they could obtain a suitable site where no nuisance would result.

Whether authority is absolute or conditional is a question of construction depending on all the circumstances of the case. Where the authority is imperative, and not merely permissive, it is necessarily absolute—that is to say, when the statute not merely authorises but also directs a thing to be done, then it may be done regardless of any nuisance that necessarily flows from it (a). An authority which is merely permissive, on the other hand, is *prima facie* conditional only; for the Legislature will not be deemed, in the absence of special reasons for so holding, to have intended to take away the rights of private persons without compensation (b). The burden of proof lies upon those who seek to show that a statute is intended to be imperative, for an intention to take away the private rights of individuals without compensation will not lightly be imputed to the Legislature (c). But none the less cases such as *Metropolitan Asylum District v. Hill* are rare, for, unless the statute gives the right to interfere with private rights it is seldom of much value. If authority is given to do something which the Legislature must have contemplated would interfere with private rights, it may be done, if done reasonably (d).

#### 4. Liability for consequences outside of statutory authority.— We have seen that no nuisance falls within the scope of a statutory

(y) As in *Powell v. Fall* (1880), 5 Q. B. D. 597.

(z) (1881), 6 App. Cas. 198. Cp. *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588.

(a) *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. p. 213.

(b) *Ibid.*, pp. 208, 213; *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Price's Patent Candle Co. v. London County Council*, [1908] 2 Ch. 526.

(c) *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Farnworth v. Manchester Corporation*, [1929] 1 K. B. p. 556. But see *Edgington v. Swindon Corporation*, [1939] 1 K. B. 86.

(d) *Edgington v. Swindon Corporation*, [1939] 1 K. B. 86; *Oakes v. Minister of War Transport* (1944), 60 T. L. 319. See Friedmann's critical article in 8 Mod. L. R. (not yet published).

authority and indemnity unless it is a necessary consequence of the act specifically authorised—that is to say, unless it cannot be avoided by the use of due care and skill. It is now to be noticed that by due care and skill in this connection is meant not merely that of the defendant himself, but that of all his agents, whether servants or independent contractors. A statutory authority to run locomotive engines includes any escape of sparks which cannot be prevented by any reasonable skill and care in construction, but does not include or legalise an escape due to the incompetence of the engineers who designed or constructed the locomotives, whether these engineers are the company's servants or not.

What, then, is the liability of the defendant for consequences which are thus unauthorised, because unnecessary? The answer is that the matter stands as at common law, the statute being inapplicable and irrelevant. If the negligence, therefore, which causes the injurious consequence is that of the defendant himself or his servants, he is liable in all cases. If, however, it is that of an independent contractor, his employer is liable only when a person is at common law liable vicariously for the acts of such a contractor (e). Thus, in *Penny v. Wimbledon Urban Council* (f) the defendant council, though acting in the exercise of statutory powers, was held liable for the negligence of a contractor who was employed by them to repair a road, and who left there a heap of soil unlighted at night to the injury of a passenger. So in *Hardaker v. Idle District Council* (g) the defendants were held liable for an escape of gas from the roadway into the house of the plaintiff, although the only negligence was that of an independent contractor, and although the defendants were acting under statutory authority (h).

5. *No duty to exercise a power.*—A statute conferring a power must not be construed as imposing a duty (i). A person entrusted with a mere power cannot be made liable for any damage sustained by reason of the fact that he has not exercised that power at all or has discontinued the exercise of it or has exercised it inade-

(e) *Infra*, s. 31.

(f) [1899] 2 Q. B. 72.

(g) [1896] 1 Q. B. 335. Cp. *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392.

(h) As to the operation of statutory authority in excluding the rule in *Rylands v. Fletcher*, see s. 148, *infra*.

(i) *Bank View Mills v. Nelson Corporation*, [1943] K. B. p. 341.

quately (*k*).<sup>1</sup> If there is no duty to do a thing there is no negligence in abstaining from doing it (*l*). Thus, where some Commissioners, with power to do drainage work, built a bank which was too low to keep flood-water from the plaintiff's land, it was held that as they were under no duty to construct a bank at all they could not be held liable merely because they had built one which was too low (*m*). The only duty owed in such a case is not to add to the damage that would have been suffered if nothing had been done (*n*).

6. *Failure to light obstructions in highway*.—The application of the principles above set out to the liability of public authorities for accidents due to the absence or insufficiency of the lighting of obstructions in the highway has been considered by the Courts in many cases, not all of which are easy to reconcile (*o*). The lighting restrictions imposed during the war of 1939 and to a lesser extent in the first Great War have added to the importance of the subject. We will therefore attempt to state shortly how the law stands at present. Sometimes a public body is given authority to provide street lighting, as under section 161 of the Public Health Act, 1875; sometimes a duty is imposed upon it to do so, as under section 130 of the Metropolis Management Act, 1855. Where a mere power or authority is conferred the public body will not be liable if, in the exercise of its discretion, it provides no lighting or insufficient lighting or discontinues lighting which it has previously provided (*p*). Where a duty is imposed the public body will be involved in liability if it fails to carry out its duty (*q*). The Lighting (Restrictions) Order, 1939, which created the "black-out", temporarily repealed that duty, whilst giving a power, though not imposing a duty to keep obstructions lighted to a limited extent.

A public body may, however, be under a duty to light independently of these statutory powers and duties. At common law an obstruction to a highway is indictable, and if it causes special

(*k*) *East Suffolk Catchment Board v. Kent*, [1941] A. C. 74, 87, 95, 102, in which case Lord Atkin delivered an important dissenting speech (see 5 Mod. L. R. 142); *Smith v. Cawdle Fen Commissioners* (1938), 160 L. T. 61. Contrast *Boynton v. Ancholme Drainage Commissioners*, [1921] 2 K. B. 213.

(*l*) *Sheppard v. Glossop Corporation*, [1921] 3 K. B. p. 145, per Scrutton, L.J.  
(*m*) *Smith v. Cawdle Fen Commissioners*, *supra*.

(*n*) *East Suffolk Catchment Board v. Kent*, [1941] A. C. p. 102.

(*o*) *Lyns v. Stepney B. C.*, [1941] 1 K. B. pp. 151-2; *Foster v. Gillingham Corporation*, [1942] 1 A. E. R. p. 306. See Friedmann, *ubi supra*, n. (*d*).

(*p*) *Sheppard v. Glossop Corporation*, [1921] 3 K. B. 132.

(*q*) *Carpenter v. Finsbury B. C.*, [1920] 2 K. B. 195.

damage to an individual is actionable at his suit (r). An unlighted obstruction is actionable, sometimes without proof of negligence (s). But public bodies are often given statutory authority to create obstructions in highways, for example, lamp standards, street refuges, sand-bins and so forth. The powers so given may be of two kinds, a power to construct the obstruction in the particular form in which it was constructed, or a merely general power such as to close a street or erect an air-raid shelter, leaving a choice as to the method in which the power should be exercised (t). In the former case under the Lighting (Restrictions) Order, 1939, it seems that the public body is under no liability if the obstruction is not lighted, even if there be negligence. The power to create the obstruction remains; the duty to light it is temporarily in abeyance (u). If the obstruction was created by an exercise of the power reasonable at the time of creation a change of circumstances, such as the diminution of light necessitated by the exigencies of war, will not make it an actionable nuisance (x). Where, however, the power is merely general, the public body exercising it will be liable for negligence (y). It will be liable, therefore, if it has itself created something which, otherwise harmless, is dangerous if unlighted (z), or if the plaintiff has been led, for example by previous lighting, reasonably to rely upon the fact that the obstruction will be lighted (a). It would have seemed an *a fortiori* case that if a local authority erected an air-raid shelter after the Lighting (Restrictions) Order, 1939, was in force they should be liable if they erected it in a place in which it was dangerous unless painted white or lighted, and they neither painted it white nor

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(r) *Infra.* s. 69.

(s) *Infra.* s. 57 (2); cp. s. 69 (4).

(t) *Foster v. Gillingham Corporation*, [1942] 1 A. E. R. 304; *Knight v. Sheffield Corporation* (1942), 167 L. T. p. 205.

(u) *Wodehouse v. Levy*, [1940] 2 F. B. 561.

(x) *Great Central Ry. v. Hewlett*, [1916] 2 A. C. pp. 519-20, *per* Lord Parker; *Lyus v. Stepney B. C.*, [1941] 1 K. B. 134. Cp. *Hesketh v. Birmingham Corporation*, [1924] 1 K. B. p. 271 (system of drainage becoming insufficient owing to increase of houses).

(y) *Foster v. Gillingham Corporation* (1942), 167 L. T. 203 (failure to discover that hurricane lamp placed upon barrier guarding bomb crater had been extinguished by high wind).

(z) *McClelland v. Manchester Corporation*, [1912] 1 K. B. 118; *Morrison v. Sheffield Corporation*, [1917] 2 K. B. 866, as explained in *Lyus v. Stepney B. C.*, [1941] 1 K. B. pp. 151-2. (It might also be explained on the special wording of the Public Health Acts Amendment Act, 1890, s. 43.)

(a) *Knight v. Sheffield Corporation*, [1942] 2 A. E. R. 411; *Baldock v. Westminster City Council* (1918), 120 L. T. 470; *Polkinghorn v. Lambeth B. C.* (1938), 158 L. T. 127. (See *Wodehouse v. Levy*, [1940] 2 K. B. p. 568.)

lighted it, but the Court of Appeal has held otherwise (b). du Parcq, L.J., however, delivered a forceful dissenting judgment and his opinion seems more in accordance with reason than that of the majority (c). He pointed out the impossibility of distinguishing as a matter of principle between leaving on the road a heap of stones in the course of doing the work and leaving on the highway a building unfinished in the sense that it has not been painted to make it safe.

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(b) *Fox v. Newcastle-upon-Tyne Corporation*, [1941] 2 K. B. 120. Cp. *Oakes v. Minister of War Transport* (1944), 60 T. L. R. 319; *Fisher v. Ruislip U.D.C.*, [1944] 2 A. E. R. 149.

(c) See Mrs. Matson's excellent note in 5 Mod. L. R. pp. 249-51. Cp. 57 L. Q. R. 446. In both *Foster's Case* and *Knight's Case*, *supra*, where the plaintiffs succeeded, the obstruction was erected after the black-out was in force.

## CHAPTER III

## PARTIES

## § 10. The Crown

*The Crown not liable for torts.*—There is no remedy against the Crown for a tort. For any violation by the Crown of the rights of subjects the appropriate remedy, if there is one at all, is not an action, but a petition of right. This remedy, however, is limited in its scope, and is not available in cases of tort. The Crown cannot be charged with negligence, fraud, or other forms of tortious wrongdoing, nor is it responsible for the acts of its agents and servants (a). This rule is subject to the following qualifications:—

- (a) A petition of right will lie against the Crown for the recovery of damages for a breach of contract; and not the less so, it is presumed, because that breach of contract is also a tort (b).
- (b) A petition of right will lie against the Crown for the specific restitution of property wrongfully detained in the possession of the Crown; or for the value of such property, when the Crown has had the benefit of it and specific restitution is impossible (c).

(a) *Tobin v. The Queen* (1864), 16 C. B. (N.S.) 310; *Feather v. The Queen* (1865), 6 B. & S. 257. For severe criticisms of this doctrine, see Professor Morgan's Introductory Chapter to Robinson's Public Authorities, and Holdsworth, H. E. L., ix, pp. 43–5.

(b) *Thomas v. The Queen* (1874), L. R. 10 Q. B. 31; *Windsor Ry. v. The Queen* (1886), 11 App. Cas. 607; *Blundell v. The King*, [1905] 1 K. B. 516.

(c) The Crown can also be made liable by petition of right in assumpsit for money received and kept by the Exchequer which has been obtained by an illegal demand made by a servant of the Crown: *Brocklebank, Ltd. v. The King*, [1925] 1 K. B. 52 (*contra*, Winfield, p. 93). But a petition of right will not lie for compensation for loss caused by a mere negative prohibition, even though it involves interference with an owner's enjoyment of his property: *France, Fenwick & Co. v. The King*, [1927] 1 K. B. p. 467, *per* Wright, J. For the history of this topic, see Holdsworth, H. E. L. ix, pp. 7–45. He thinks the Crown liable for conversion and nuisance (at pp. 41–43); *contra* McNair, 43 L. Q. R. p. 9. Romer, J., in *Re Mason*, [1928] Ch. p. 404, agreed with Dr. McNair. In 1921 a committee was appointed by Lord Birkenhead to consider the position of the Crown as litigant: in 1927 they submitted a draft Bill dealing with the matter. This Bill has not yet been submitted to Parliament: it makes substantial changes in the law. Crown proceedings are no longer to be by way of petition of right, but are to be proceeded with in the same manner as an action in the High Court between subjects; the Crown is to be liable in tort, and liable for the wrongful acts of its officers in the same way as a private principal is liable for the acts of his agent. But the Bill does not apply to proceedings by or against His Majesty in His private capacity. A Bill

"The only cases", it has been said (d), "in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money; or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service."

### § 11. Public Officials

1. *Liability of the servants and agents of the Crown.*—The irresponsibility of the Crown does not extend to its agents and servants. Every such agent or servant is personally responsible for all torts committed by him, and it is no defence that the act complained of was done by him in his public capacity, or in the name and on behalf of the Crown, or by the express command or authority of the supreme executive. He cannot successfully plead that it was an act of State (e). "The civil irresponsibility of the supreme power for tortious acts", it has been said by the Privy Council (f), "could not be maintained with any show of justice if its agents were not personally responsible for them."

2. *Public servants not responsible for their subordinates.*—The rule of employers' liability, however, is not applicable to public officials so as to make them responsible for the acts of other public officials who are subordinate to them. Thus, the Secretary of State for War cannot be sued in tort for the negligence of some subordinate official of the War Office; for the relation between him and his subordinate is not that of master and servant; they are fellow-

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prepared by Sir Henry Slessor in 1928 to the same general effect was not proceeded with: 166 L. T. Jo. 456. Cp. MacKinnon, L.J., in *Minister of Supply v. British Thomson-Houston Co.*, [1948] K. B. p. 486.<sup>3</sup>

(d) *Feather v. The Queen* (1865), 6 B. & S. p. 294.

(e) *Minister of Supply v. British Thomson-Houston Co.*, [1948] K. B. p. 492, per Goddard, L.J.

(f) *Rogers v. Rajendro Dutt* (1860), 13 Moore P. C. at p. 236. See also *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343. According to the American Restatement (s. 146), a member of the armed forces is granted immunity if his act is reasonably necessary for the execution of a command issued by a superior if the command is lawful, or is believed by the defendant to be lawful and is not so palpably unlawful that any reasonable man would recognise its illegality. This probably correctly states the principle of English law as to criminal responsibility. See Stallybrass, J. C. L. (3rd series), Vol. XIV, p. 234



servants of the Crown (g). It is otherwise, indeed, if an actual authority to commit the tort is given by the superior to his inferior; "in such case the higher official can be sued, not because he occupies an official position, but in spite of that fact" (h). But it is not enough that the inferior was acting within the general scope of his employment, as in the ordinary case of master and servant (i).

3. The mere fact that persons are intrusted by law with public functions does not in itself make them public servants so as to exempt them from liability for the acts of their subordinates. Thus, in *Mersey Docks Trustees v. Gibbs* (j) the defendant corporation was held liable for the negligence of its servants notwithstanding the fact that it had been established by statute for public purposes exclusively. It was a public body, but not a servant of the Crown or a department of the executive Government; therefore its subordinates were in its own service and not in the service of the Crown. Similarly, municipal corporations, district councils, and other bodies corporate established for the purposes of local government are responsible for their servants; for they are not themselves the servants of the Crown (k). But, as we shall see (kk), some corporations bear so immediate a relation to the Crown as probably to share the Crown's exemption from liability.

4. *Aliens and acts of State*.—The rule that the authority of the Crown is no defence to a public official in an action of tort does not apply when the plaintiff is a non-resident alien and the injury complained of is suffered elsewhere than in British dominions (l). No such alien can complain in an English Court of any such act done by the authority, precedent or subsequent, of the English

(g) *Bainbridge v. P. M. G.*, [1906] 1 K. B. 178; *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. 300. Statutes can, however, provide otherwise. So the Ministry of Transport Act, 1919, provides that the Minister shall be responsible for the acts and defaults of the servants and agents of the Ministry as if they were his servants. In practice as a matter of grace the Crown usually accepts responsibility for torts committed by its servants. When in charge of Government vehicles, it must be satisfied that at the time of the accident the servant was discharging Government duty, and the determination of that issue has, where desired, since 1942 been referred to an independent person: 193 L. T. Jo. 157-8. But this is not an entirely satisfactory solution: see Mr. Justice Lowe in 11 Australian Law Jo. p. 405.

(h) *Arbon v. Anderson*, [1942] 1 A. E. R. p. 266, per Luxmoore, L.J.

(i) *Raleigh v. Goschen*, [1898] 1 Ch. 73.

(j) (1866), L. R. 1 H. L. 93. See also *Gilbert v. Trinity House* (1881), 17 Q. B. D. 795; *Metropolitan Meat Industry Board v. Sheedy*, [1927] A. C. 899.

(k) See Robinson, Public Authorities, Chs. 2 and 3. As to the liability of incorporated departments of the executive Government, see s. 13 (7), *infra*.

(kk) *Infra*, s. 13 (7).

(l) Winfield (p. 99) doubts whether it is only if the act is done outside the British dominions that the doctrine applies.

Crown. To British subjects the English Courts will grant redress even against the agents of the Government, wherever the wrong may have been committed (*m*), but those who owe no allegiance to the Crown may, save in British dominions, be dealt with by the Crown as it pleases. Thus, in *Buron v. Denman* (*n*) the defendant, the commander of a British man-of-war, had destroyed certain property of an alien slave-trader on the coast of Africa in circumstances that would have given a good cause of action to a British subject. It was held, however, that inasmuch as the act of the defendant had been ratified by the British Government, it was an act of State for which no action would lie at the suit of an alien. In such cases, if redress is to be obtained, it must be obtained through diplomatic channels.

The rule in *Buron v. Denman* has no application in time of peace to injuries inflicted within the Crown's dominions. An alien friend resident within those dominions owes temporary allegiance to the King, and he has the same legal protection as a British subject against imprisonment or other personal injuries though inflicted by an act of State (*o*). Similarly, if an alien friend, though resident abroad, owns property in England, his title thereto will have the same protection, even against the Crown, as if it belonged to a British subject (*p*).

An alien enemy, on the other hand, possesses no rights against the Crown. His residence within the realm by the express or tacit licence of the Crown gives him legal protection against private persons (*q*), and the English Courts are open to him, but probably he remains none the less at the mercy of the Crown, which may do with him and with his property as is thought fit (*r*).

(*m*) *Walker v. Baird*, [1892] A. C. 491.

(*n*) (1848), 2 Ex. 167.

(*o*) *Johnstone v. Pedlar*, [1921] 2 A. C. 262. This was not always so: for the history, see Holdsworth, H. E. L., ix, pp. 91-9.

(*p*) *Commercial and Estates Co. of Egypt v. Board of Trade*, [1925] 2 K. B. pp. 290, 297, *per* Scrutton and Atkin, L.J.J. (*obiter*).

(*q*) *Johnstone v. Pedlar*, [1921] 2 A. C. 262, 283.

(*r*) The question of the status of an alien enemy is one which on several occasions and in various aspects came before the Courts for decision during the two wars with Germany. The matter, however, does not relate exclusively or even chiefly to the law of torts, and the law is far from being completely developed. Its discussion in this place, therefore, is thought unnecessary. The problems arising in connection with the law as to acts of State are discussed at greater length by Winfield, pp. 96-100, and Pollock, pp. 88-92. See also Wade in 15 B. Y. B. I. L. pp. 98 *sqq.*; Holdsworth in 41 Col. L. R. 1313 *sqq.*; Stallybrass in J. C. L., February, 1933, p. 79.

## § 12. Foreign Sovereigns, Ambassadors and Public Officials

1. *Foreign sovereigns not liable*.—A foreign sovereign is not liable in English Courts for any tort committed by him. "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages" (s). The only remedy for injuries done by him is by way of diplomatic and executive action on the part of the British Government (t).

It makes no difference that the wrongful act is committed in England. A foreign sovereign does not by residing in British territory waive his privilege or submit himself to the jurisdiction of the local Courts. Nor does it make any difference that the wrongful act is done by the sovereign in his private capacity. The exemption extends to all the acts of a sovereign, and not merely to acts of State (u). But the sovereign's immunity ceases (except possibly for acts of State) upon the termination of his sovereign status, e.g., abdication (w).

2. A foreign sovereign within the meaning of this rule of immunity, includes (a) an independent State possessed of corporate or quasi-corporate personality—e.g., the United States of America (x); (b) the personal head of an independent State under royal or monarchical government; (c) probably the personal head even of a republican State—e.g., the President of the French Republic or of the United States of America (y).

3. *Foreign ambassadors not liable*.—An ambassador or other public minister exercising diplomatic functions and accredited to

(s) *The Cristina*, [1938] A. C. p. 490, per Lord Atkin.

(t) This does not always provide a satisfactory remedy; *S.C.*, per Lord Maugham, at p. 515. But see 54 L. Q. R. p. 342.

(u) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; *The Parlement Belge* (1880), 5 P. D. 197.

(w) *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656. See 59 L. Q. R. pp. 48-9.

(x) There may be two rival sovereign Governments in the same country at the same time—one *de jure*, the other *de facto*. So in *The Arantzazu Mendi*, [1938] P. 233; [1939] P. 37; [1939] A. C. 256, it was held that the Nationalist Government in Spain could not be impleaded at a time when the Republican Government was still recognised as the only *de jure* government in the country. But see 7 Camb. L. J. p. 271. Is the *de jure* Government deprived of its immunities? Are full immunities accorded to diplomatic agents of the *de facto* Government? *Quære*, see H. A. Smith in 55 L. Q. R. p. 164.

(y) The ruling princes of the native Indian States, though under the suzerainty of His Majesty, are sovereigns within the meaning of this rule: *Statham v. Statham*, [1912] P. 92.

the King of England by a foreign State or sovereign cannot be sued during his term of office for any tort (c). The right of action against him, however, is not non-existent, but is merely suspended during his term of office. Upon his recall he becomes subject, like any other alien, to the jurisdiction of English Courts, and may be sued even for a cause of action which arose during his period of service. In such a case the Statute of Limitations does not begin to run in his favour until the expiration of his privilege enables a writ to be served upon him (a). "Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction" (b).

4. *Foreign acts of State*.—An act of State has been defined (c) as "an act of the Executive as a matter of policy performed in the course of its relations with another State, including its relation with the subjects of that State". It also has a wider meaning in which it covers acts affecting the State's own subjects (d). In most cases the personal immunity of the wrong-doer will deprive the Court of jurisdiction, but not always (e). The question arises whether the immunity is granted solely *ratione personæ* or also *ratione materiæ*. In practice it has been assumed that in this country it is the personal position of the defendant, not the nature of the act the subject-matter of the proceedings that is of decisive importance (f). But in *Princess Paley Olga v. Weisz* (g) the Court of Appeal held that our Courts are bound to give effect to the laws and acts of a foreign Government so far as they relate to property within its jurisdiction.

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(z) Diplomatic Privileges Act, 1708; *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94. The privilege extends to a secretary of legation (*Taylor v. Best* (1854), 14 C. B. 487; *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139), and other members of the Embassy staff (e.g., the chief of the mail department: *Assurance Compagnie Excelsior v. Smith* (1923), 40 T. L. R. 105, or an assistant military attaché: *The Amazone*, [1940] P. 40), but not to a consul: *Viveash v. Becker* (1814), 3 M. & S. 284. See *Engelke v. Musmann*, [1928] A. C. 433, and Hall, *International Law* (8th ed.), pp. 224-31. The Diplomatic Privileges Act, 1708, is for the most part declaratory but it is not exhaustive of the common law: *The Amazone*, *supra*. The privilege of a diplomatic agent may be waived by him or his official superior with the consent of his sovereign: *Re Suarez*, [1918] 1 Ch. 176; *Dickinson v. Del Solar*, [1930] 1 K. B. 376; *R. v. A. B.*, [1941] 1 K. B. 454. If an Ambassador or Minister waives the privilege it is assumed that he is acting in accordance with the instructions of his Government: *Re Suarez*, *supra*, at p. 191.

(a) *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

(b) *Dickinson v. Del Solar*, [1930] 1 K. B. p. 380, *per* Lord Hewart, C.J.

(c) *Wade* in 15 B. Y. B. I. L. p. 103.

(d) *Ibid.* p. 102.

(e) 59 L. Q. R. 166.

(f) See authorities referred to in 59 L. Q. R. 47.

(g) [1929] 1 K. B. 718, but Russell, L.J. (at p. 736) limited his statement to acts done against a State's own subjects.

It is possible that the effect of this decision may be limited to acts done by the Government itself, and may not apply to the acts of subordinate officials acting as agents of the Government (*h*), and it has been held (*i*) not to apply to acts affecting the personal freedom of persons living in this country within the protection of the Crown, the validity of which can be examined by the Courts of this country. But the decision goes far to justify the use of the phrase "the sacrosanctity of the foreign act of State" (*j*).

### § 13. Bodies Corporate

1. *Liability of corporations always vicarious.*—Inasmuch as a corporation is a fictitious person distinct in law from its members, it is not capable of acting in *propria persona*, but acts only through its agents or servants. All the acts, and therefore all the wrongful acts, of a body corporate are in fact the acts of its agents or servants, though imputed in law to the corporation itself. The liability of a body corporate is therefore in all cases a vicarious liability for the acts of other persons.

2. *Extent of responsibility of corporation for acts of its servants or agents.*—The existence and extent of the liability of a corporation in actions of tort were at one time a matter of doubt, due partly to technical difficulties of procedure and partly to the theoretical difficulty of imputing wrongful acts or intentions to fictitious persons (*k*). It is now well settled, however, that the liability of a corporation for the torts committed by its agents or servants is governed by the same rules as those which determine the liability of any other principal or employer. This liability extends, moreover, to wrongs of malice or fraud, no less than to wrongs of other descriptions. Thus a corporation can be sued for malicious prosecution, or for malicious libel on a privileged occasion, or for fraudulent misrepresentation, no less than for trespass, conversion, or negligence (*l*).

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(*h*) 59 L. Q. R. p. 164. On the whole topic, which involves many interesting problems in the Conflict of Laws, see F. A. Mann's exhaustive discussion in 59 L. Q. R. 42 *sqq.*, 155 *sqq.* *Princess Paley Olga's Case* was cited as authority in *De Beeche v. South American Stores, Ltd.*, [1935] A. C. 148.

(*i*) *Re Amand* (No. 2), [1942] 1 K. B. 445, 449, *per* Wrottesley, J.

(*j*) The title of Mann's article, *ubi supra*.

(*k*) *Abrath v. N. E. Ry.* (1886), 11 App. Cas. 247, at pp. 250-1, *per* Lord Bramwell.

(*l*) *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259. See Pollock, *Essays*, p. 179; Street, *Ultra Vires*, pp. 259-57.

3. *Liability of corporations for ultra vires torts.*—It is commonly said, however, that this liability of a corporation for the acts of its agents or servants exists only where the scope of the authority or employment of those agents or servants is within the statutory or other legal limits of the corporation's powers, and that if a corporation goes beyond the limits set by law for its activities, and enters upon any business or undertaking which is *ultra vires*, it cannot be made liable for torts committed by its agents or servants in the course of that business or undertaking. In other words, the rule that a corporation is not bound by contracts which are *ultra vires*, is commonly said to apply also to torts which are *ultra vires*, in the sense that they are committed in the course of some activity which is beyond the limits of the corporation's powers (*m*). There is, however, no sufficient authority for any such exemption of corporations from the consequences of their disregard of the limits of their powers. It is contrary to practical requirements and has been rejected in numerous American decisions (*n*).

The English decision commonly cited as a supposed authority for the exemption of corporations from liability for *ultra vires* torts is *Poulton v. London & S. W. Ry.* (*o*). In this case a railway company, having statutory authority to arrest passengers for non-payment of their fares but not for other reasons, was held not responsible for the act of a stationmaster in arresting a passenger for refusing to pay the freight payable for a horse. There Blackburn, J., said (*p*): "The railway company having no power themselves, they cannot give the stationmaster any power, to do the act". But the true ground of the decision, common to all the members of the Court, was merely that the *implied* authority of a stationmaster does not extend to the doing of acts which are *ultra vires* of the company, and that in the absence of any proof of *express* authority the stationmaster was acting beyond the scope of his employment and the company was therefore not responsible (*q*).

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(*m*) Cl. & L. pp. 55-6; Lindley, Companies, i, pp. 257-9 (6th ed.); Halsbury, viii, s. 854.

(*n*) Sir John Salmond cited *The National Bank v. Graham* (1879), 100 U. S. p. 702, and *Salt Lake City v. Hollister* (1885), 118 U. S. p. 260, but Goodhart in 2 Camb. L. J. pp. 351-2, has pointed out that these contain mere *obiter dicta*. Salmond also cited *Nims v. Mount Hermon Boys' School* (1893), 39 Am. State Rep. 467, and *Central Railroad and Banking Co. v. Smith* (1889), 52 Am. Rep. 333.

(*o*) (1867), L. R. 2 Q. B. 534.

(*p*) At p. 540.

(*q*) See the explanation of this case by Lush, J., in *Campbell v. Paddington Corporation*, [1911] 1 K. B. p. 878, and by Kelly, C.B., in *Mill v. Hawker*, L. R. 9 Ex. 309, p. 324. In the last-mentioned case Pigott and Cleasby, BB. (Kelly, C.B., dissenting) were apparently of opinion that a corporation could not be held liable for

It is submitted that in order to discover the law on this subject a distinction must be drawn between the primary representatives of a corporation and its servants. "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself" (r), or it may be the managing director or general manager (s) or other person having authority from the board of directors to conduct the company's business (t). So in *Campbell v. Paddington Corporation* (u) a metropolitan borough, in pursuance of a formal resolution of its council, erected a stand in a highway which was a public nuisance. It was held that the corporation was liable, although they had no legal right to erect the stand. "To say that, because the borough council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation" (w).

The true principle is, it is submitted, the following: Every act done, authorised, or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by any person or body of persons to whom the general powers of the corporation are delegated, is for the purpose of the law of torts the act of the corporation itself, whether *intra vires* or *ultra vires* of the corporation, and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the

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*ultra vires* torts, and that the action in such cases lay only against the members or agents by whom the wrongful act was done on behalf of the corporation. It is submitted that this is not so, and that the American decisions cited above to the opposite effect are sound in principle and should be followed. See also *Doolan v. Midland Ry.* (1877), 2 App. Cas. 793; *Whittaker v. L. C. C.*, [1915] 2 K. B. 676; *Ormiston v. G. W. Ry.*, [1917] 1 K. B. p. 602, *per* Rowlatt, J.

(r) *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A. C. p. 713, *per* Lord Haldane. Cp. *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. p. 533, *per* Atkin, L.J.; Friedmann, *Legal Theory*, 381, n. 46.

(s) *Fanton v. Denoille*, [1932] 2 K. B. p. 329, *per* Greer, L.J.

(t) *Rudd v. Elder Dempster*, [1933] 1 K. B. p. 594, *per* Lawrence, L.J. See C. R. N. Winn, *The Criminal Responsibility of Corporations*, in 3 *Camb. L. J.* pp. 408-12.

(u) [1911] 1 K. B. 869.

(w) At p. 875, *per* Avory, J. Cp. *Harker v. Britannic Assurance Co.*, [1928] 1 K. B. p. 772, *per* Lord Hewart, C.J.

corporation<sup>a</sup> within the scope of his authority or employment. If, for example, a municipal council establishes the business of a tramway, the municipal corporation will be liable in tort for the negligence of the servants employed in the management of the tramway, or for any nuisance created by the working of it, notwithstanding the fact that the business so undertaken is beyond the limits of the corporation's statutory powers (x).

4. *Statutory limits of liability of corporations.*—The foregoing rules as to the liability of a corporation are subject to any express or implied indication of a contrary intention in the statute to which the corporation owes its existence. But, in the absence of anything to the contrary, it is presumed that the Legislature intended the corporation to incur the same liabilities as would be incurred by an individual doing the same things (y).

5. *Foreign corporations.*—A foreign corporation (that is to say, one which is created by the law of any country other than England) may sue and be sued in England for a tort, just as an English corporation may (z).

6. *Liability of members of corporation for torts committed by it.*—The members of a corporation are not *as such* liable for torts committed by the corporation. For the purposes of the law of torts, no less than for those of the law of contracts or of property, a body corporate is a personality distinct from its members; and just as a member is not responsible for the debts contracted by a corporation, so also he is not responsible for torts committed by it. From this undoubted principle the very doubtful inference has sometimes been

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(x) Professor Goodhart criticises Sir John Salmond's views on the ground that an *ultra vires* contract is not binding on a corporation, and that to hold a company liable for an *ultra vires* tort, when it is not held bound by an *ultra vires* contract, would be contrary to the established principles of the law of agency and of master and servant. A corporation, he says, is not liable for torts committed in the course of an *ultra vires* enterprise because it cannot employ a servant to do the act, even if it were to be done rightfully: 2 Camb. L. J. 350; Essays, pp. 90 *sqq.* He is driven to regard the decision in *Campbell v. Paddington Corporation*, *supra*, as unsatisfactory, as do Cl. & L. p. 56, and Street, *Ultra Vires*, p. 265. See also 54 L. Q. R. p. 129; 55 L. Q. R. p. 124. Winfield agrees in general with the statement in the text (pp. 117-9), and for a partial answer to Professor Goodhart, see Stallybrass in J. C. L., February, 1931, pp. 142-4. Professor Goodhart is logical, but Holdsworth (H. E. L. ix, 49-62) says: "Practical convenience rather than theoretical considerations have [*sic*] from the days of the Year Books onwards, determined what activities are possible, and what are impossible to a corporation." Cp. his *Lessons from Our Legal History*, p. 154. So also Smith, *Associations*, ch. 3; McKerron, p. 116.

(y) *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. pp. 104, 110.

(z) *Henriques v. Dutch West India Co.* (1728), 2 Ld. Raym. 1532; *Newby v. Van Oppen* (1872), L. R. 7 Q. B. 293.



drawn that the members of a corporation are not liable for torts committed by it, even if they have themselves acted as the agents by whom the corporation has so acted (a). But it is undoubted law that the servants or agents by whom a corporation commits a tort are themselves personally liable in the same case and to the same extent as any other servants or agents who commit torts in the service or on behalf of their principals or employers. It is difficult, therefore, to understand why the corporators themselves, if they act as the agents of the corporation, should not be equally liable for any wrongful acts so committed by them.

7. *Incorporated departments of the Government.*—In certain cases a body corporate is so constituted and bears so immediate a relation to the Crown that it must be regarded as a branch of the executive Government of the realm—an incorporated servant of the Crown. This is so, for example, with the Commissioners of His Majesty's Works and Public Buildings. It seems, though it is not yet finally determined, that in the absence of any express statutory provisions to the contrary, such a corporation has the same exemption from liability in tort as the Crown itself (b). It possesses no legal personality or capacity otherwise than as an agent of the Crown, and any liability imposed upon it would in reality be imposed upon the Crown. The only remedy, therefore, of any person injured by the wrongful act of such a corporation is against the individual persons by whom it exercises its functions and not against the corporation itself.

#### § 14. Unincorporated Bodies: Trade Unions

*No action will lie against a trade union.*—Until 1901 it was generally agreed that a corporation and an individual or individuals were the only entities known to the common law who could sue or

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(a) *E.g.*, by Kelly, C.B., in *Mill v. Hawker* (1874), L. R. 9 Ex. 309, p. 321. On appeal to the Exchequer Chamber no opinion was expressed on this point, the Court being apparently divided. See also *Harman v. Tappenden* (1801), 1 East 555; Robinson, *Public Authorities*, pp. 273-6, and Street, *Ultra Vires*, pp. 315-18.

(b) *Roper v. Commissioners of His Majesty's Works*, [1915] 1 K. B. 45; *Public Works Commissioners v. Pontypridd Masonic Hall Co., Ltd.*, [1920] 2 K. B. 233; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517, *per* Bankes, L.J. But in the latter case Atkin, L.J., expresses *obiter* his disagreement with this view. He thinks that such a corporation may be made liable for a tort actually committed by it or to which it is directly privy. But he recognises the practical difficulties. Such a corporation will probably have no private assets available for execution, and it has no servants, for, as in the case of individual officials, those who serve under it are not its servants but servants of the Crown. Such an action would therefore probably be very unprofitable to the plaintiff.<sup>c</sup> *Cp. Marshal Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343.

be sued. But in that year, in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* (c), it was held by the House of Lords that a trade union, though not a corporate body, could be sued in an action of tort for the wrongful acts of its officials. The ground given for this much-criticised (d) decision was that the Trade Union Acts of 1871 and 1876, by conferring upon Trade Unions many valuable rights in connection with the protection of their funds, had impliedly rendered them liable to be sued for torts committed by their officials acting upon their behalf. On the same principle the Court of Appeal held in *Marshall Shipping Co. v. Board of Trade* (e) that the Board of Trade, though merely an unincorporated committee of the Privy Council, "a body of changing persons without perpetual succession", could be sued in that name, not as individuals but in their official capacity. For "a body which can own property must be capable of being sued" (f).

In the case of trade unions, however, it was provided by section 4 of the Trades Disputes Act, 1906, that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court" (h). It is not easy to understand on what principle of justice these wealthy and powerful associations were thus raised above the law and exempted from all liability for their wrongful acts (i).

As a result, however, of the General Strike in 1926 (k), the

(c) [1901] A. C. 426. Cp. *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58.

(d) E.g., Jenks, *Short History of English Law*, p. 336. For the history of this topic, see Holdsworth, *H. E. L.*, ii, 401-5; iii, 469-90. See also Smith, *Associations*, pp. 71-8; Geldart, 25 *H. L. R.* pp. 594-8.

(e) [1923] 2 K. B. 343.

(f) [1923] 2 K. B. p. 355, *per* Scrutton, L.J. Cp. *Att.-Gen. v. Great Southern and Western Ry.*, [1925] A. C. pp. 776-9, *per* Lord Phillimore.

(h) See *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107. The operation of the section is not confined to those unions which are formed of workmen or masters: *Hardie and Lane v. Chiltern*, [1923] 1 K. B. 663. The Act does not protect officials of a trade union from personal liability for wrongful acts done by or on behalf of the union. *Bussy v. Amalgamated Society of Ry. Servants* (1908), 24 T. L. R. 437. And see also *infra*, s. 156 (10), and Wade and Phillips, p. 95, n. (2).

(i) For an excellent and dispassionate account of the genesis of the Trades Disputes Act, see Lord Asquith's *Industrial Problems and Disputes*, pp. 88-96. Writing in 1920 he said: "This Act is now regarded as a charter of liberty by some trade unionists, and is denounced as a charter of licence by some employers. It is neither one nor the other. . . . Privilege, once legalised, is not easily changed; but it will last much longer if it is found not to have been abused."

(k) Astbury, J., in *National Sailors' and Firemen's Union v. Reed*, [1926] Ch. 539-40, held that the General Strike was illegal. This pronouncement was unnecessary for the decision, and was powerfully criticised by A. L. Goodhart, "The

Legislature re-imposed a liability for their wrongful acts upon trade unions in a limited class of cases. The Trade Disputes and Trade Unions Act, 1927, declares that a strike or lock-out is illegal if it has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking-out are engaged, and is a strike or lock-out designed or calculated to coerce the Government either directly or by inflicting hardship upon the community. If both these conditions are satisfied, the Act provides that it is illegal to commence or continue, or to apply any sums in furtherance or support of, any such illegal strike or lock-out. It then enacts that the provisions of the Trade Disputes Act, 1906, shall not apply to any act done in contemplation or furtherance of a strike or lock-out which is illegal under the Act, and any such act shall not be deemed for the purposes of any enactment to be done in contemplation or furtherance of a trade dispute. Trade unions and employers, therefore, are now rendered liable to actions for tort which their agents may commit within the scope of their authority in connection with such illegal strikes or lock-outs (1).

### § 15. Minors

1. *Infancy no defence in action of tort.*—A minor is in general liable for his torts in the same manner and to the same extent as an adult. In certain other branches of the law liability is excluded by the fact that the defendant is below a certain age. Thus, a child under eight years of age is exempt from all responsibility for crimes committed by him. A child between the ages of eight and fourteen is presumed to be incapable of criminal intent, though this presumption may be rebutted by proof to the contrary. A person under the age of twenty-one is in general free from all liability for breach of contract. In the law of torts, however, there are no similar rules of exemption. Thus a child of any age may be sued for trespass to land or conversion, and will be held liable in damages just as if he were an adult.

*Evidential effect of infancy.*—The youth of the defendant is not in all cases wholly irrelevant, however, even in an action of tort. For it may be evidence of the absence of the particular mental state which is an essential element in the kind of tort in question. Thus,

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Legality of the General Strike in England": Essays, p. 226. The Act of 1927 on this point is, however, in form a declaration of the existing law. See also Hanbury, Essays, p. 106.

(1) Ferguson, The Trade Disputes and Trade Unions Act, 1927.

if an action is based on malice or on some special intent, the fact that the defendant is extremely young is relevant as tending to disprove the existence of any such malice or intent. Similarly, it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decisions on the contributory negligence of children (*m*). In general the principle would seem to be that a minor who is incapable of forming a culpable intention or of realising the probable consequences of his conduct is relieved from liability in those cases in which fault is essential to liability, but that wherever a liability is imposed irrespective of fault, he is fully liable as a normal adult (*n*).

2. *Liability of infant for torts which are also breaches of contract.*—When the act of a minor is both a tort and a breach of contract, is he liable for the tort, notwithstanding that the contract is not binding on him, or does his exemption from an action for breach of contract protect him against an action for the tort also? On this point the law cannot be regarded as settled, but the better opinion would seem to be that in such cases liability for the tort exists, and that it is no defence that the act was also the breach of an invalid contract. Thus, in *Burnard v. Haggis* (*o*) the defendant, a young man under the age of twenty-one, hired a mare for riding, and in breach of his agreement he used her for jumping and so injured her. It was held by the Court of Common Pleas that the defendant was liable in tort, notwithstanding the fact that it was at the same time the breach of a non-actionable contract. In *Walley v. Holt* (*p*), a similar decision was given by a Divisional Court in the case of a minor who hired a horse and injured it by overdriving. So if an infant bailee refuses to redeliver the chattel bailed, he can be sued for conversion or in detinue as in *Ballet v. Mingay* (*q*) where a minor hired a microphone and was unable to

(*m*) *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Harrold v. Watney*, [1898] 2 Q. B. 320. Cp. *Liddle v. Yorkshire C.C.*, [1934] 2 K. B. p. 125. *per Greer, L.J.*

(*n*) See the exhaustive discussion in Bohlen, *Studies*, 543-76. Pollock, p. 48, and Winfield, p. 107, agree with the statement in the text. *Contra*, Landon, note in Pollock, *loc. cit.*

(*o*) (1863), 14 C. B. (N.S.) 45.

(*p*) (1876), 35 L. T. 631.

(*q*) [1943] K. B. 281. Cp. *R. v. MacDonald* (1865), 15 Q. B. D. 323. The rule, as above stated, to the effect that an infant is liable for his torts even though they are also breaches of contract is contrary, indeed, to the early case of *Jennings*.

return it as he had parted with it to a third person contrary to the terms of the bailment.

3. But it seems well settled that the Courts will not allow a plaintiff to enforce an unenforceable contract in a roundabout way by framing his action in tort. So, if a minor purchases goods, and retains them in his possession, while refusing to pay for them, he cannot be sued in detinue. In such a case the property in the goods passes to the infant by delivery. The contract, though void, is, it would seem, sufficiently recognised at law to constitute a *causa* for the transfer of property just as *donatio* was one *causa* for the passing of property by *traditio* under Roman law (r).

4. *An infant's liability for fraud in procuring contract.*—There is, however, an important exception to the rule that a minor is liable for his torts. He is not liable in tort for procuring a contract by means of fraudulent representations either as to his age or as to any other matter (s). If a minor fraudulently pretends to be of full age, whereby the plaintiff is induced to contract with him, the contract is not for that reason binding on the minor, nor is he estopped

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*v. Rundall* (1799), 8 T. R. 335, but it is submitted that this case is wrongly decided. The facts were that the defendant hired a horse, and injured it by driving it too far [cp. the similar facts in the old case: *Anon.* (1390), Y. B. Ric. II (Ames' Foundation), p. 103]; and he was held not liable in an action of tort, on the ground that the contract of bailment was not binding on him. The decision, therefore, would seem to be directly in conflict with the later cases of *Burnard v. Haggis* (1863), 32 L. J. C. P. 189, and *Walley v. Holt* (1876), 35 L. T. 631. An attempt is sometimes made to reconcile them by drawing a distinction between torts which are merely wrongful modes of performing a contract and torts which are outside the contract altogether. This distinction, however, seems a merely verbal one, having no logical basis or substance in it. It is submitted that *Jennings v. Rundall* is a mistaken application of a correct principle—namely, that if the act of a minor is in reality merely a breach of contract, he cannot be made liable by being sued in tort instead. In the old days of forms of action and of legal fictions this was a principle very necessary to be insisted on; for in those days the tort sued on in a delictual action was often a mere fiction, the real cause of action being a breach of contract and nothing more. Thus, a breach of warranty on a sale of goods was commonly sued on in tort instead of contract—*case* instead of *assumpsit*. *Supra*, s. 3 (4). It was in reference to these fictitious torts that the Courts laid down the rule that an infant or married woman could not be sued in tort unless also liable in contract. Thus, in *Green v. Greenbank* (1816), 2 Marsh. 485, an infant was sued in case for breach of warranty, and the action was held not to lie. Gibbs, C.J., said: "The cases . . . clearly show that where the substantial ground of action rests on promises, the plaintiff cannot by changing the form of action render a person liable who would not have been liable on his promise." But this rule has no application where there is at the same time a *real* tort as well as a real breach of contract: *supra*, s. 3 (4). See, however, *Faucett v. Smethurst* (1915), 84 L. J. K. B. 473. See also S. & W. 819-20.

(r) *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. p. 613, *per* Lord Sumner, p. 627, *per* A. T. Lawrence, J.; *Manby v. Scott* (1664), 1 Sid. p. 129; *Stocks v. Wilson*, [1913] 2 K. B. p. 246, *per* Lush, J. Sir John Salmond, however, did not accept this view (6th ed. p. 71); S. & W. (pp. 317-8) accepts it.

(s) *Johnson v. Pye* (1665), 1 Sid. 258; *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607.

from pleading his infancy (t). Neither can the plaintiff sue in tort for the deceit (u). So if an infant sells a horse and fraudulently represents it to be sound, this representation creates no liability either in contract or in tort. Yet if an infant is capable of fraud, there would seem to be little reason why he should not be liable for it.

5. *Equitable obligation of restitution.*—Although a minor who procures a contract by a fraudulent representation that he is of age is not liable either on the contract or in tort, he is nevertheless subject to an equitable obligation of somewhat undefined extent to restore any property or other advantage thereby obtained by him (w).

6. *Fathers not responsible for their children's torts.*—A father is not liable for the torts of his children, even while they are under age and living in his house. It is to be observed, however, that a child may be his father's servant, so as to bring the father within the rule as to employers' liability. If a father sends his son on an errand with a horse and cart, he will answer for his son's negligence in driving; but he will answer for him, not as being his father, but as being his employer (x). Moreover, a father may be liable for his own personal negligence in affording or allowing his child an opportunity of doing mischief. So in *Bebee v. Sales* (y) a father supplied his son, fifteen years of age, with an air-gun and allowed him to remain in possession of it after warning and complaint of mischief done thereby. Thereafter the boy accidentally wounded the plaintiff by discharging the gun, and the father was held liable for his own negligence in thus supplying his son with the means of negligent mischief.

### § 16. Lunatics

*Lunacy as a defence in an action of tort.*—There is no adequate English authority as to the liability of lunatics for torts committed

(t) *Liverpool Adelphi Association v. Fairhurst* (1854), 9 Ex. p. 430; *Bartlett v. Wells* (1862), 1 B. & S. 836; *Levene v. Brougham* (1909), 25 T. L. R. 265.

(u) *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607. This case has been questioned by Hanbury, *Essays*, p. 14. But *vide supra*, s. 15 (3). In *Cowern v. Nield*, [1912] 2 K. B. 419, notwithstanding the generality of the expressions there used as to the liability of a minor for fraud, it is not to be assumed that the Court intended to lay down any different principle.

(w) See Salmond and Winfield, pp. 317-9, and *R. Leslie, Ltd. v. Sheill*, [1914] 3 K. B. 607. It seems impossible to reconcile with this decision some of the *dicta* of Lush, J., in *Stocks v. Wilson*, [1913] 2 K. B. 235. The decision on the facts in the latter case, however, seems to be correct: see S. & W. (1st ed.) p. 466.

(x) *Gibson v. O'Keeney*, [1928] N. Ir. 66.

(y) (1916), 32 T. L. R. 413. *Gp. Sullivan v. Creed*, [1904] 2 Ir. B. 317; *Dixon v. Bell* (1816), 5 M. & S. 198.

by them. On principle, however, we may say with some confidence that lunacy is not in itself any ground of exemption, but that, like infancy, it operates (if at all) only as evidence that the mental state requisite to create liability is not present. In applying this rule it is necessary to distinguish between different species of wrongs:—

(a) In wrongs based on malice or on some specific intent, like malicious prosecution, malicious libel on a privileged occasion, or deceit, lunacy may be a good defence as disproving the existence of any such malice or intent.

(b) In wrongs of voluntary interference with the person, property, reputation, or other rights of other persons, such as trespass, assault, conversion, or defamation, it is no defence that the defendant was under an insane delusion as to the existence of a sufficient legal justification. For in such cases, as we have seen (z), mistake, however inevitable, is no defence; and it can make no difference that the mistake is due to unsoundness of mind. A lunatic, therefore, who converts another's property to his own use under the insane delusion that it is his own, or who publishes a defamatory statement under the insane belief that it is true, is just as liable as if he were sane. If, however, the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and therefore no liability (a). Mischief done by an epileptic in one of his paroxysms, or by a fever patient in his delirium, or by a somnambulist in his sleep is presumably not actionable.

(c) In wrongs of absolute liability there is no reason why lunacy should be any defence at all.

(d) In wrongs dependent upon negligence the conduct of the defendant must be judged by reference to his knowledge or means of knowledge. Lunacy, therefore, may be relevant as evidence that the necessary knowledge or means of knowledge did not exist (b).

(z) *Supra*, s. 5 (3).

(a) Cp. Lord Esher in *Hanbury v. Hanbury* (1892), 8 T. L. R. p. 560; *Emmens v. Pottle* (1885), 16 Q. B. D. p. 356.

(b) The English authorities as to the liability of lunatics for torts are merely early *dicta* to the effect that lunacy is no defence in an action of trespass. Bacon's *Maxims of the Law*, Reg. VII.; *Weaver v. Ward*, Hobart 134; Bacon's *Abr. Trespass*, G. I.; Hale's *Pleas of the Crown*, I, 15; Brydall's *Non Compos Mentis*, pp. 83, 107; see also Serjeant Manning's note to *Borradaile v. Hunter* (1849), 5 M. & G. p. 669. In America there have been numerous cases as to the liability of lunatics, and the authorities will be found collected in Bohlen, *Studies*, 543-74. As to fraud, see 41 H. L. R. 1065. See also Rurdick on Torts, s. 67 (4th ed.). In *Donaghy v. Brennan* (1900), 19 N. Z. L. R. 289, the Court of Appeal of New Zealand

## § 17. Married Women

1. *Actions by a wife against her husband.*—At common law a wife could not in any case sue her husband for a tort. Her protection against her husband was provided by the criminal law and not by the law of civil injuries. By the Married Women's Property Act, 1882, this rule has been so far departed from that a married woman can now sue her husband in tort for the protection and security of her separate property. Section 12 of that Act provides that every married woman "shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, but except as aforesaid no husband or wife shall be entitled to sue the other for a tort". Thus she may sue him for the detention or conversion of chattels belonging to her (c), or for negligent or malicious injury to her property, or even (subject to his marital right of *consortium*) for trespass by entering her dwelling-house without her permission (d). But she cannot sue him for assault, libel (e), false imprisonment, malicious prosecution or other personal injury (f). She cannot bring an action for damages for deceit, but she may bring one for the rescission of a deed on the ground that she has been induced by fraud to execute it (g). Further, marriage destroys even a cause of action which has already accrued. Thus in *Gottliffe v. Edelston* (h) the plaintiff was a passenger in the defendant's motor car and sustained serious injuries as a result of his

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held a lunatic liable for intentionally wounding the plaintiff by firing a gun at him. See Pollock's criticism (with which his editor, Mr. Landon, does not agree), *Torts*, p. 49. For a full discussion of such authorities as there are, see Cook, *Insanity and Mental Deficiency*, pp. 17—60. Cook, however, attaches too little weight to the survival in modern law of the mediæval principle in the law of torts that the law has regard to the compensation of the injured party rather than to the blameworthiness of the defendant. See also comparison of the law of other countries in Winfield, pp. 120—1.

(c) *Larner v. Larner*, [1905] 2 K. B. 539.

(d) See *Weldon v. De Bathe* (1884), 14 Q. B. D. 339; *Symonds v. Hallett* (1883), 24 Ch. D. 346; *Shipman v. Shipman*, [1924] 2 Ch. 140.

(e) Whether she can sue him for a libel which affects her credit and character as a trader, *quære*? *Summers v. City Bank* (1874), L. R. 9 C. P. p. 583, *per* Brett, J.; *Ralston v. Ralston*, [1930] 2 K. B. 238.

(f) *Tinkley v. Tinkley* (1909), 25 T. L. R. 264. Nor can her administrator or executors recover damages for loss of expectation of life owing to her death caused by her husband's negligence: *Chant v. Read*, [1939] 2 K. B. 346.

(g) *Hulton v. Hulton*, [1917] 1 K. B. 813. The jurisdiction of the Courts of Equity to rescind a contract for fraud or innocent misrepresentation antedates the action for the tort of deceit, and the Married Women's Property Act, s. 12, did not take away the right to rescission which the wife previously had.

(h) [1930] 2 K. B. 378. McCardie, J., seized the opportunity to give a long and interesting disquisition upon the injustices under which married men laboured at that time in this country.



negligent driving. Shortly after the accident they became engaged, and later a writ was issued. Three months after the writ they married. It was held that the marriage had destroyed the cause of action.

2. *Actions by a husband against his wife.*—A husband cannot sue his wife for a tort in any case (i). The common law rule prohibiting actions between husband and wife was not modified in this respect by the Married Women's Property Act, 1882. Probably by an oversight that Act did not confer on the husband the same right of suing for the protection or security of his property as is conferred by the same Act upon his wife (k).

3. *Spouse acting as agent.*—If the decision of Charles, J., in *Smith v. Moss* (l) is correct, there is, however, one case in which the husband may have a remedy for his wife's tort. In that case a wife was injured owing to the negligence of her husband whilst he was driving a car as agent for his mother. It was held that his wife could recover against her mother-in-law for personal injuries. The active operator in the tort, the husband, had two capacities, that of husband and that of agent, and it was whilst he was acting in the latter capacity that the accident happened. The result would clearly have been the same if it had been the wife who was driving and the husband who was injured. But it is submitted that by the use of the ambiguous word "agent" Charles, J., obscured the issue. If the husband was a servant, which appears to have been the case (m), he himself had committed no tort, since it was his wife who was injured. How then could his mistress be vicariously liable for it? If on the other hand he was an independent contractor there could be no liability imposed upon the principal, since she was not, as the authorities stand, in breach of a non-delegable duty.

4. *Summary proceedings between husband and wife.*—Although a husband is thus deprived of any right of action for damages

(i) *Webster v. Webster*, [1916] 1 K. B. 714.

(k) Nor did the Law Reform (Married Women and Tortfeasors) Act, 1935, make any change in this respect, in spite of the hint of the Law Revision Committee (Cmd. 4770, p. 12): But in *Hill v. Hill*, [1916] W. N. 59, Neville, J., granted a mandatory injunction directing a wife to deliver up to her husband his furnished house of which she was in occupation. But *semble* he cannot bring an action for the recovery of land, because if she is wrongly in occupation she is a trespasser and it is an action in tort: *Bramwell v. Bramwell*, [1942] 1 K. B. 370, 374, *per* Goddard, L.J.

(l) [1940] 1 K. B. 424. This decision is in accord with the American Restatement, s. 880. See 56 L. Q. R. 301, and 18 Can. Bar Review 280.

(m) *Vide infra*, s. 26 (6).

against his wife, special provision is made by the Married Women's Property Act, 1882, s. 17, for the settlement of disputes between husband and wife as to the ownership or possession of property. A Judge of the High Court or of the county court is empowered, on application by summons, to make in such a case such order as he thinks just. This summary remedy in lieu of action is available both for the husband and the wife (n).

5. *Effect of death or divorce.*—The dissolution of the marriage by divorce does not enable either party to sue the other for a tort committed during the existence of the marriage (o). Nor does it make any difference that the injury was committed during the interval between the decree *nisi* and the decree absolute of divorce (p). Similarly on the dissolution of the marriage by the death of either party, the executors cannot sue or be sued by the surviving spouse for any tort committed during the marriage, for which an action would not have lain between the parties themselves (q). If, however, after the dissolution of the marriage by divorce or death, there is any continuing or renewed cause of action, an action will lie in respect thereof between the parties or between the surviving party and the executors of the other as, for example, if a wife converts her husband's chattels to her own use and remains in possession of them at the time of her death or divorce.

*Effect of judicial separation.*—Between 1857 and 1935 where spouses were living apart under either a decree of judicial separation or a separation order, either was capable of suing the other in tort (r). But apparently this is no longer the law since the Law Reform (Married Women and Tortfeasors) Act, 1935 (s). Divorced spouses can of course sue each other for torts committed after the dissolution of the marriage.

6. *Liability of a married woman for torts.*—Before the Married Women's Property Act, 1882, the separate estate of a married woman was not liable in equity for her general torts. But at

(n) *Phillips v. Phillips* (1888), 13 P. D. 220. The procedure under s. 17 is not the only way in which a dispute between husband and wife may be determined. It may be settled in interpleader proceedings in which they are claimants: *De la Rue v. Hernu*, [1936] 2 K. B. 164.

(o) *Phillips v. Barnett* (1876), 1 Q. B. D. 436.

(p) *Cp. Slessor, L.J., in Fender v. Mildmay*, [1936] 1 K. B. pp. 125-6.

(q) *Phillips v. Barnett* (1876), 1 Q. B. D. at p. 439.

(r) Matrimonial Causes Act, 1857, s. 26; Supreme Court of Judicature (Consolidation) Act, 1925, s. 194 (1) (b); *Robinson v. Robinson* (1897), 13 T. L. R. 564.

(s) This appears to be the (probably unintended) effect of s. 5 (1) and the First Schedule. See 81 L. J. (N.) 141.

common law she could be sued for her torts, though, if her husband was not joined, she could plead her coverture in abatement. If sued jointly with her husband and judgment went against both she could be taken in personal execution. If it then appeared that she had no separate estate, the Court would discharge her as a matter of indulgence (t). The Act of 1882 made her liable to be sued separately; but damages recovered against her were only enforceable out of her separate property not restrained from anticipation (u). If she were carrying on a trade separately from her husband she could be made bankrupt in respect of her separate property as if she were a *feme sole* (w). Now under the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman may be sued for her torts by any one except her husband, and is subject to the law relating to bankruptcy and to the enforcement of judgments and orders in all respects as if she were a *feme sole* (x). Before that Act she could not be made bankrupt unless she was carrying on a separate trade.

7. *Liability of a husband for his wife's torts.*—The Act of 1935 made a still bigger change in the position of the husband. At common law a husband was liable to be joined with his wife in all actions for torts committed by her during the subsistence of the marriage, and the House of Lords finally decided in *Edwards v. Porter* (y) that the husband's liability had not been taken away by the Married Women's Property Act, 1882. Further by section 14 of the Act of 1882 a husband was liable for his wife's ante-nuptial torts to the extent of any property which he had acquired from her on marriage. But, as the Act of 1882 had deprived the husband of all his interest *jure mariti* in his wife's separate property and earnings, out of which he might have satisfied a claim for his wife's wrongdoing, it became his hard fate to continue to bear the burden of his wife's wrong-doings when he had been relieved of the means which would have assisted him to bear it (z). This injustice has now been remedied. The Act of 1935 (a) made "a clean legal sweep of the old legal fiction of our common law that a woman on marrying

(t) *Scott v. Morley* (1887), 20 Q. B. D. 120.

(u) Dig. p. 325.

(w) S. 1 (5). For the effect of the repeal of s. 125 of the Bankruptcy Act, 1914, by the Act of 1935, see Wms. Bkey. p. 41.

(x) But any restriction upon anticipation or alienation attached to the enjoyment of any property by any act or instrument made before January 1, 1936, is still operative.

(y) [1925] A. C. 1.

(z) See Lord Cave in *Edwards v. Porter*, [1925] A. C. at p. 14.

(a) S. 3.

became merged in the personality of her husband, and ceased to be a fully qualified and separate human person" (b). Under that Act the husband of a married woman is not, by reason only of his being her husband (c), liable in respect of any tort committed by her whether before or after the marriage, or to be sued or made a party to any proceeding brought in respect of any such tort. But a husband and wife may be jointly liable in respect of a tort in like manner as if they were not married (d). The Act is retrospective, except as to an action commenced before the Act (e).

### § 18. Felons

Criminals, even when undergoing imprisonment, have with one exception the same rights of action for torts as a man with a blameless life. The exception is under the Forfeiture Act, 1870 (f), which when it abolished forfeiture for felony provided that the right to sue for any injury to the property of a convict who had been sentenced to death or penal servitude should be vested in the administrator or interim curator so long as he is serving his sentence or until he is made bankrupt or released on ticket of leave. There are two things to note about this Act: it does not apply to a man convicted of felony but sentenced to imprisonment as distinct from penal servitude; it does not apply to actions for purely personal injuries, such as assault or libel, which may probably still, as at common law (g), be brought by the convict in his own name, for such actions do not pass to the administrator (h).

### § 19. Bankrupts

*Torts committed by bankrupts.*—A bankrupt is in no special position as regards torts committed by him, whether before or during the bankruptcy. The Bankruptcy Act, 1914 (i) provided that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust should not be provable against the trustee in bankruptcy. The bankrupt remains liable to be sued. But if the demand arises from a contract

(b) *Barber v. Pigden*, [1937] 1 K. B. p. 677, per Scott, L.J.

(c) So he will be liable where he has authorised the tort on the general principle of liability for the acts of an agent: *infra*, s. 24 (1); *Barber v. Pigden*, [1937] 1 K. B. 664. For common law cases, see 189 L. T. Jo. 165.

(d) S. 4 (2) (c).

(e) *Barber v. Pigden*, *ubi supra*.

(f) Ss. 1, 7, 30.

(g) Com. Dig., Forfeiture, B 2.

(h) Cl. & L. p. 42. *Contra*, O'Sullivan in *Gatley*, p. 427.

(i) S. 30 (1).

it is not the less provable against the trustee because it might also be framed in tort, as where a passenger on a tram was injured owing to the negligence of the driver (*k*). Again, under the Law Reform (Miscellaneous Provisions) Act, 1934 (*l*), where the plaintiff has a right of action in tort against the estate of a deceased wrongdoer, and that estate is insolvent, he may prove in the administration of the estate for unliquidated damages.

*Torts committed against bankrupts.*—Where a right of action exists for a tort committed against the bankrupt, a distinction is taken. A right of action in respect of a tort which results in injuries exclusively to the person or feelings of the bankrupt does not pass to the trustee (*m*). On the other hand a right of action which results in injuries exclusively to the estate of the bankrupt passes to the trustee away from the bankrupt. Where the tort results in injuries both to the estate and also to the person or feelings of the bankrupt, the right of action for the tort, in so far as it results in injuries (*n*) to the estate, will pass to the trustee: in so far as it results in injuries to the person or feelings of the bankrupt, it will remain in him. In such a case the trustee and bankrupt can either bring separate actions or join as plaintiffs in one action in which case the damages will be assessed under two separate heads (*o*).

### § 20. Executors and Administrators

1. *Causes of action in tort died with the parties at common law.*—Subject to important exceptions, until 1934 no executor or administrator could sue or be sued for any tort committed against or by the deceased in his lifetime. This was the purport of the maxim of the common law *Actio personalis moritur cum persona*—a personal action dies with the parties to the cause of action (*p*). An action for a tort had to be begun in the joint lifetime of the wrongdoer and the person injured. If, after it had been so begun, either of the parties died before a verdict had been obtained, the

(*k*) *Re Great Orme Tramways Co.* (1934), 50 T. L. R. 450: Wms. Bkcy. p. 154.

(*l*) S. 1 (6).

(*m*) *Beckham v. Drake* (1849), 2 H. L. C. 579. In such a case the bankrupt may spend the damages, if he recovers any, in the maintenance of himself and his family: *Ex p. Vine* (1878), 8 Ch. D. 364.

(*n*) *Rose v. Buckett*, [1901] 2 K. B. 449.

(*o*) *Wilson v. United Counties Bank*, [1920] A. C. 102. See Wms. Bkcy. pp. 280-2.

(*p*) Upon this maxim, see Goudy in *Essays in Legal History*, pp. 215-32; Winfield in 29 Col. L. R. 239; Walton in J. C. L. (3rd series), xviii, 40; the Interim Report of the Law Revision Committee, 1934 (Cmd. 4540); and for the history, Holdsworth, H. E. L., iii, 576-83.

action abated, and could not be continued or recommenced by or against the representatives of the deceased (q).

This rule, however, had been to a very large extent eaten away by exceptions, some of which were admitted by the common law itself, while others had been introduced by statutes ancient and modern. Their aggregate effect was, speaking generally, to abolish the rule so far as it related to injuries to property, but to leave it in full operation with respect to injuries of other kinds (r).

2. *Survival of causes of action.*—But sweeping changes were made in the previous law by the Law Reform (Miscellaneous Provisions) Act, 1934. Before that Act it was “cheaper to kill than to maim or cripple” (s). The Act states as the general rule that in future on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.

3. *Loss of expectation of life.*—At the time that the Act was passed it was not generally recognised that loss of expectation of life was a separate head of damage (t). In the leading case of *Rose v. Ford* (u) the House of Lords, reversing the Court of Appeal (w), held that a right of action for damages for loss of expectation of life when death resulted survived to the personal representative. A living person can claim damages for such loss. The right is vested in him in life and on his death passes to his personal representative who stands in his shoes. The fact that the expectation is realised, i.e., that the death comes at the time anticipated or sooner, cannot make any difference (x). The cause of action is not the death but the negligence which caused it, and even if there is only a split second between that act of negligence and the death—and, it would

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(q) See *Finlay v. Chirney* (1888), 20 Q. B. D. 494; *Phillips v. Homfray* (1883), 24 Ch. D. 489; Ord. 17, r. 1. The question whether a cause of action survives the death of the person injured must be carefully distinguished from the question whether the act of causing the death of a person gives any right of action for damages to his relatives. The former question is that which is considered in this section; the latter will be dealt with later in connection with the provisions of the Fatal Accidents Act. See s. 92.

(r) For details of the law before 1934 see the 8th ed. of this work, s. 20. For criticism of the new law see 91 L. J. (N.) 34 and 46.

(s) [1937] A. C. p. 846, *per* Lord Wright. But see Landon in Pollock, p. 54, n. (h).

(t) *Infra*, s. 91 (2).

(u) [1937] A. C. 826. In New Zealand the rule in *Rose v. Ford* is abolished by the New Zealand Statutes Amendment Act, 1937, s. 17.

(w) [1936] 1 K. B. 90.

(x) [1937] A. C. pp. 884, 889, 846.

seem, even if the death is instantaneous—the action will descend to the personal representative (y).

4. *Exceptions.*—But to the general rule there are certain exceptions. There is no survival of causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or of claims in the Divorce Division for damages on the ground of adultery (z) (a).

5. *Measure of damages where executor sues.*—It is clear that different considerations may apply to cases in which the executor or administrator is plaintiff from those which apply to cases in which he is defendant. The Act gives recognition to this fact and has provided that where the executor or administrator is plaintiff, the damages recoverable for the benefit of the estate—

(a) shall not include exemplary damages (b),

(b) where the death has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to the estate consequent on the death, except that a sum in respect of funeral expenses may be included (c).

Thus if the death is that of a person entitled to an annuity or a life interest, the loss of the annuity or the life interest must be disregarded in calculating the damages, and similarly if the deceased's life was insured the receipt of the insurance moneys will be disregarded (d).

6. *No duplication of damages for loss of expectation of life.*—The Act expressly provides by section 1 (5) that the rights for the benefit of the estates of deceased persons are in addition to and not in derogation of the rights of dependants conferred by the Fatal

(y) *Morgan v. Scoulding*, [1938] 1 K. B. 786. But see 57 L. Q. R. pp. 462-3, 465.

(z) S. 1 (1).

(a) It is not clear why this should be so. Defamation may cause much more harm to the next-of-kin than an assault. The reason given by the Law Revision Committee (Cmd. 4540, p. 7) that "the presence of the plaintiff or of the defendant may be of the greatest importance" is unconvincing. Nor is it clear whether "seduction" is used in its narrower popular sense or in its wider legal meaning covering all enticement of a servant: *infra*, s. 95. See 2 Mod. L. R. 16, and Landon in Pollock, p. 53, n. (g).

(b) Why should exemplary damages be irrecoverable if damages for pain and suffering can be recovered, *quare*? See 2 Mod. L. R. 16. But see 5 Mod. L. R. pp. 98-101.

(c) S. 1 (2). The provision made for the recovery of funeral expenses is anomalous: they could not be recovered as part of the deceased's cause of action.

(d) The loss of future earnings cannot be recovered: *Benham v. Gambling*, [1941] A. C. p. 167; Lord Roche in *Rose v. Ford*, [1937] A. C. at p. 861.

Accidents Acts (e) and the Carriage by Air Act, 1932. What, then, is the position where those who benefit under the Fatal Accidents Acts are the same persons as those who benefit under the will or on intestacy under the Law Reform Act? It has been made clear that there can be no duplication of damages (f). If the action under the Law Reform Act is brought first or at the same time as the action under the Fatal Accidents Acts the damages recovered under the latter Acts will be *pro tanto* reduced (g). But if the action under the Fatal Accidents Acts is brought first it might be thought (h) that section 1 (2) of the Law Reform Act would prevent any diminution for that reason of the sum awarded in an action under that Act. It has been held (i) that this is not so. For "one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced" (k). Again, the possibility of subsequent proceedings under the Law Reform Act may have been allowed for in the damages awarded in the action under the Fatal Accidents Act (l).

7. *Limitation of actions.*—Whilst proceedings under the Fatal Accidents Act (m) must be taken within twelve months after the death, no special period of limitation is fixed for actions brought by executors under the Act of 1934. There seems to be no particular justification for this distinction. On the other hand no proceedings can be taken *against* the estate of a deceased person unless *either* the proceedings were pending at the date of his death *or* the cause of action arose not earlier than six months before his death and the

(e) *Infra*, s. 92.

(f) *Rose v. Ford*, [1937] A. C. pp. 835, 852; *Davies v. Powell Duffryn Collieries*, [1942] A. C. p. 623.

(g) *Rose v. Ford*, *ubi supra*, p. 835; *Ellis v. Raine*, [1939] 2 K. B. 180; *Davies v. Powell Duffryn Collieries*, [1942] A. C. 601. It is best to claim the whole of the damages under the Fatal Accidents Acts: *Hutchinson v. L. & N. E. Ry.*, [1942] 1 K. B. p. 491. The damages recovered under the Law Reform Act are subject to death duties, whereas those recovered under the Fatal Accidents Acts are not: *Hall v. Wilson*, [1939] 4 A. E. R. p. 86; *Feay v. Barnwell*, [1938] 1 A. E. R. p. 36.

(h) As apparently by Luxmoore, L.J., in *Yelland v. Powell Duffryn Collieries*, [1941] 1 K. B. p. 531.

(i) *Rose v. Ford*, [1937] A. C. pp. 852-3; *May v. McAlpine & Sons*, [1938] 3 A. E. R. 85. See also *The Azikaraai Mendi*, [1938] P. 263; 54 L. Q. R. p. 3, and 2 Mod. L. R. p. 63; 5 Mod. L. R. p. 101.

(k) *Rose v. Ford*, [1937] A. C. p. 853, *per* Lord Wright.

(l) *Davies v. Powell Duffryn Collieries*, [1942] A. C. 601, 608, 621. Cp. *du Parcq, L.J.*, in *Yelland's Case*, *supra*, at p. 534. Many astute suggestions for any one asked to advise as to how the greatest amount of money may be secured will be found in an article by Dr. Glanville Williams, 3 Mod. L. R. 68.

(m) *Infra*, s. 92.



proceedings are taken not later than six months after his personal representative took out representation (n). Representation must therefore be taken out before the action is commenced unless the proceedings were pending at the date of death. If the person entitled to represent the estate refuses to take out letters of administration the Court may appoint as administrator a nominee of a person who wishes to take proceedings against the estate (o).

Where the cause of action, as in the case of disturbance of the right of support (p), does not arise until the damage has been suffered, the Act of 1934 expressly provides (q) that if the wrongdoer dies before or at the same time as the damage is suffered, there shall be deemed to be subsisting against him such cause of action as would have subsisted if he had died after the damage was suffered. The beneficent intentions of this provision will be defeated by section 1 (3) if the damage is suffered more than six months after his personal representative has taken out representation. The injured party will then be without redress, for he probably cannot in such a case sue the present occupier (r).

## § 21. Proceedings against Joint and Several Tortfeasors

1. *Joint tortfeasors*.—Where the same damage is caused to a person by two or more wrongdoers those wrongdoers may be either joint or independent tortfeasors. Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort—that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases—namely, agency (s), vicarious liability (t), and common action, i.e., where a tort is committed in the course of a common action, a “joint act done in pursuance of a concerted purpose” (u). In order to be joint tortfeasors they must, in fact or in law, have committed the same wrongful act. “There must be a concurrence in the act or acts causing damage, not merely a coincidence of

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(n) S. 1 (3).

(o) *In the estate of Simpson*, [1936] P. 40.

(p) *Vide infra*, s. 60 (9). So also with actions of negligence. Cp. the cases in s. 38 (2), n. (l), *infra*.

(q) S. 1 (4).

(r) *Vide infra*, s. 60 (14). See J. Foster in 2 Mod. L. R. pp. 17—18.

(s) *Vide infra*, ss. 24 (1), 31.

(t) *Vide infra*, ss. 25, 26 (1).

(u) *Per Salter, J.*, in *Brooke v. Bool*, [1928] 2 K. B. p. 585.

separate acts which by their conjoined effect cause damage" (w). The *injuria* as well as the *damnum* must be the same (x).

*Liability of joint wrongdoers.*—Joint wrongdoers are jointly and severally responsible for the whole damage. That is to say, the person injured may sue any one of them separately for the full amount of the loss; or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any one of them (y). How far there is any right of contribution or indemnity as between the wrongdoers themselves we shall consider in the next section.

2. *Same damage caused by independent torts.*—But there are many cases in which the same damage is caused by independent and separate wrongful acts of several persons, as where a plaintiff sustains a single damage from the combined negligence of two motor car drivers, who are not engaged in a common design, *e.g.*, racing on the road (z). Thus in *Thompson v. London County Council* (a) the plaintiff's house was injured by the subsidence of its foundations, caused by excavations negligently made by A, taken in conjunction with the negligence of B, a water company, in leaving a water-main insufficiently stopped. It was held that A and B, inasmuch as their acts were independent of each other, were not joint wrongdoers, and could not be joined as such in the same action. "The damage", said Collins, L.J. (b), "is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." Such tortfeasors are severally liable for the same damage, not jointly liable for the same tort (c).

(w) *The Koursk*, [1924] P. p. 159, *per* Sargant, L.J.

(x) *S.C.* p. 156, *per* Scrutton, L.J. *Cp. Ash v. Hutchinson & Co.*, [1936] Ch. 489.

(y) *Mitchell v. Tarbutt* (1794), 5 T. R. 649. It is said, however, in the older authorities that liability arising from the ownership or occupation of land in common is not joint and several, but merely joint. 1 Wms. Saund. 291, *g. Sed. qu.*

(z) *The Koursk*, [1924] P. 140; *cp. also Morris v. Robinson* (1824), 3 B. & C. 196. A failure to distinguish joint from independent torts may have helped to lead the Court of Appeal astray in *United Australia, Ltd. v. Barclays Bank*, [1939] 2 K. B. 53; [1941] A. C. 1. See Lord Wright in 57 L. Q. R. p. 191.

(a) [1899] 1 Q. B. 840. See also *Sadler v. G. W. Ry.*, [1896] A. C. 450.

(b) [1899] 1 Q. B. p. 845.

(c) Persons who are thus severally liable for the same damage, instead of being jointly and severally liable for the same tort, could not at common law be joined in the same action for damages, for it was not permissible in one and the same action to claim damages from A for one tort and from B for another. In what cases they can now be joined depends on the true construction of Q. 16, r. 4: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative." This does not,

3. *Judgment against one joint wrongdoer.*—At common law a judgment obtained against one joint wrongdoer released all the others, even though it was not satisfied. The tort was merged in the judgment. This rule was established by the judgment of the Court of Exchequer Chamber in *Brinsmead v. Harrison* (d).

The rule was, however, abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935 (e), which provides that when judgment has been recovered against any tortfeasor it shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. The merits of the rule in *Brinsmead v. Harrison* were placed by Blackburn, J. (f), on the maxim *interest reipublicæ ut sit finis litium*. And Kelly, C.B., pointed out (g) that if a judgment was not a bar to subsequent proceedings judgment having been recovered against one or more of the wrongdoers, and damages assessed, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. “Which amount is the plaintiff to levy?”

These considerations were present to the minds of those responsible for the Act of 1935, and it is therefore thereby provided (h) that if more than one action is brought in respect of the same damage against tortfeasors (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and that the plaintiff shall not be entitled to costs in any of those actions except that in which judgment is first given (i), unless the Court is of opinion that there was reasonable ground for bringing the action.

4. *Release of one joint wrongdoer.*—The release of one joint wrongdoer releases all the others, even though this was not the intention of the parties, “the reason being that the cause of action,

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however, as a general rule justify the joinder of two distinct causes of action in tort against different defendants. It is difficult, however, as the authorities stand, to state definitely how far this joinder is permissible. See 9th ed. of this work, note (m) at p. 80, and authorities there cited.

(d) (1871), L. R. 7 C. P. 547. Contrast *Bulmer Rayon Co. v. Freshwater*, [1933] Ch. 162; [1933] A. C. 661, where it was held that the defendants were not joint tortfeasors.

(e) S. 6 (1) (a), which came into force on November 1, 1935.

(f) L. R. 7 C. P. p. 553.

(g) L. R. 7 C. P. pp. 551-2.

(h) S. 6 (1) (b).

(i) See s. 6 (3) (b).

which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released" (k). This rule is equally applicable to a release under seal and to a release by way of accord and satisfaction (l).

A mere covenant or other agreement not to sue one of the joint wrongdoers must, however, be distinguished from an actual release given to him, whether by deed or by accord and satisfaction. An agreement not to sue does not, like a release, destroy the cause of action, but merely prevents it from being enforced against the particular wrongdoer with whom the agreement was made (m).

### § 22. Contribution between Tortfeasors

1. *Abolition of rule in Merryweather v. Nixan*.—At common law no person who had been guilty of fraud or any other form of wilful wrongdoing, and had been made liable in damages, had any right of contribution or indemnity against any other person who was a joint wrongdoer with him. This was commonly known as the rule in *Merryweather v. Nixan* (n), the case in which it was first laid down, but in which it was very imperfectly considered and formulated.

The rule in *Merryweather v. Nixan* was abolished as regards torts committed after November 1, 1935, by the Law Reform (Married Women and Tortfeasors) Act, 1935. That Act provides (o) that a tortfeasor may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise (p).

2. *Exception where right of indemnity between tortfeasors*.—No contribution can be recovered from a co-tortfeasor who is entitled to be indemnified by the person seeking contribution. Thus:—

(a) A wrongdoer cannot recover contribution from an innocent person whom he has led into the commission of a tort. For a

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(k) A. L. Smith, L.J., in *Duck v. Mayeu*, [1892] 2 Q. B. at p. 513. It has been suggested (Foster, 2 Mod. L. R. p. 20) that the principle upon which this rule is founded having been repudiated by the abolition of the rule in *Brinsmead v. Harrison*, *supra*, s. 21 (3), this rule should also go.

(l) *Thurman v. Wild* (1840), 11 A. & E. 453.

(m) *Duck v. Mayeu*, [1892] 2 Q. B. 511. A transaction which is in form an actual release, whether by deed or by accord and satisfaction, will be construed as being merely an agreement not to sue, if it contains an express reservation of the right to proceed against the other wrongdoers. For this reservation would otherwise be wholly ineffective. *Ibid.*; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9.

(n) (1799), 8 T. R. 186.

(o) S. 6 (1) (c).

(p) For problems arising from this, see Foster in 2 Mod. L. R. pp. 19–20.

principal must indemnify his agent for all liability incurred by him in consequence of the act authorised being (without the knowledge of the agent) an illegal one. "This principle is of the widest general application" (q). Thus, in *Adamson v. Jarvis* (r) the plaintiff, an auctioneer, was held entitled to be indemnified by the defendant, a client, who had instructed him to sell goods to which, as it subsequently appeared, he had no title.

(b) It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, but in *Ryan v. Fildes* (s), Tucker. J., was prepared to believe that there might be cases in which it was not.

3. *Assessment of contribution*.—The framers of the Act of 1935 borrowed the principles of the Maritime Conventions Act, 1911 (t), in determining the measure of contribution, and provided (u) that in proceedings against any person for contribution the amount of the contribution recoverable should be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and gave the Court power to exempt any person from liability, or to order a complete indemnity (w). It has been held (x) that the distribution of the responsibility is to be regarded from the point of view of causation and is not to be dependent on the respective degrees of negligence of the parties (y).

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(q) *Secretary of State v. Bank of India* (1938), 159 L. T. p. 102, per Lord Wright. See also *Sheffield Corporation v. Barclay*, [1905] A. C. p. 397, per Lord Halsbury, L.C.; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Cory & Son v. Lambton Collieries* (1917), 86 L. J. K. B. 401; Cl. & L. pp. 62-3.

(r) (1827), 4 Bing. 66.

(s) [1938] 3 A. E. R. 517, at p. 526. Liability for the acts of an independent contractor is not true vicarious liability, *infra*, s. 31 (1), and therefore in such a case Hilbery, J., refused to grant the principal an indemnity: *Daniel v. Rickett Cockerell & Co.*, [1938] 2 K. B. 322. This was criticised in 55 L. Q. R. 10, but *cp. Burnham v. Boyer*, [1936] 2 A. E. R. 1165.

(t) *Infra*, s. 126.

(u) S. 6 (2).

(w) Scott, L.J., in *Croston v. Vaughan*, [1938] 1 K. B. at p. 565, thought the power of ordering a complete indemnity illogical, because the sub-section assumed the joint liability of two tortfeasors. But this seems hypercritical.

(x) *Smith v. Bray* (1939), 56 T. L. R. 200, per Hilbery, J. By the Maritime Conventions Act, 1911, *infra*, s. 126, the liability is "in proportion to the degree in which each vessel was in fault"; see *The Peter Benoit* (1916), 114 L. T. 147.

(y) The trial Judge can deal with the question of contribution at the trial: *Croston v. Vaughan*, [1938] 1 K. B. 540. Only in very exceptional cases should an appeal Court interfere with the Judge's apportionment: *The MacGregor*, [1943] A. C. 197; *Ingram v. United Automobile Services*, [1943] K. B. 612.

4. *Agreement to indemnify*.—The above provisions all apply whether the tort is a crime or not (z). This makes a striking exception to the general principle of the common law: *ex turpi causa non oritur actio*. But it is provided (a) that the Act shall not render enforceable any agreement for indemnity which would not have been enforceable if the Act had not been passed. The result appears to be that, although where the agreement was not enforceable before the Act no proceedings can be taken upon the agreement to indemnify, indemnity may be given by the Court where it is found to be just and equitable. The Law Reform Committee upon whose recommendations (b) the Act of 1935 was based gave as one instance of the "hardship" of the common law doctrine the case of *Smith & Sons v. Clinton* (c). In that case the plaintiffs agreed to publish a newspaper for the defendants, one of the terms being that the defendants should give the plaintiffs a letter of indemnity against claims arising out of the publication of libellous matter in the newspaper. A libel was published, and the plaintiffs were unsuccessful in their action on the letter of indemnity to recover the damages which they had paid to the person libelled. As the law now stands they would still be unable to recover on the letter of indemnity, but they might take proceedings for such contribution as might be found to be just and equitable.

5. *Directors' liability, and Maritime Conventions Act*.—In addition to the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, there are two other earlier statutory exceptions to the rule in *Merryweather v. Nixan*.

(a) Section 37 (3) of the Companies Act, 1929 (d), provides that there shall be a right of contribution between directors or promoters who are jointly and severally liable, under the provisions of that Act, for misrepresentations contained in a prospectus. Even in this case, however, a person guilty of fraud has no claim against another who is guilty merely of negligence (e).

(b) Section 3 of the Maritime Conventions Act, 1911, creates a right of contribution between two ships in the case of loss of life or personal injuries where both ships are in fault (f).

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(z) S. 6 (1).

(a) S. 6 (4) (c). An indemnity for the commission of an unlawful act is unenforceable.

(b) Cmd. 4637.

(c) (1908), 99 L. T. 840.

(d) Re-enacting s. 84 of the Companies (Consolidation) Act, 1908.

(e) See *Geipel v. Peach*, [1917] 2 Ch. 108.

(f) For details *vide infra*, s. 126.

### § 23. Persons Jointly Injured

1. *At common law, all persons jointly injured must join in one action.*—Where two or more persons possess a right of action in respect of one and the same injury—as, for example, a trespass or other wrong to the property of co-owners, or a libel on a firm of partners in the way of their business—is it necessary that those persons should all join in one and the same action, or can one of them sue without the others? The old rule of the common law on this point was that (with certain exceptions which need not be now considered) all persons so suffering a joint injury must join in one action. The objection of non-joinder, however, could be taken only by way of a plea in abatement (g), and if the defendant omitted so to plead, one of two co-owners, for example, could recover damages in respect of his own interest in the property, although the other co-owner was not a party to the action. After judgment had been so recovered by him, a second action would lie at the suit of the other co-owner in respect of his own interest, and in the second action no plea of abatement was available (h).

2. *Effect of abolition of pleas in abatement.*—Pleas in abatement being now abolished, it follows that the non-joinder of persons jointly injured is no longer a bar to an action by one or some of them. The only effect of such a non-joinder is that the Court may, in its discretion, order the other persons so jointly injured to be joined as parties to the action, either as plaintiffs or (if they will not consent) as defendants (i).

3. *Release by one of several persons jointly injured.*—Where two or more persons have suffered a joint, but not a several, injury, a release granted by one of them will, in the absence of fraud, destroy the whole cause of action, and operate as a bar to an action by any of the others (k).

(g) A plea in abatement was one which showed grounds for quashing the original writ, without at the same time tending to deny the right of action itself. See Sutton, *Personal Actions*, ch. 9; Holdsworth, *H. E. L.*, ix, 268-9. But O. XXI, r. 20, now provides that "no plea or defence shall be pleaded in abatement".

(h) *Addison v. Overend* (1796), 6 T. R. 766; *Sedgworth v. Overend* (1797), 7 T. R. 279; *Blackborough v. Graves* (1673), 1 Mod. 102; *Broadbent v. Ledward* (1839), 11 A. & E. 212; Chitty on Pleading, I, 73.

(i) *Roberts v. Holland*, [1893] 1 Q. B. 665; *Cullen v. Knowles*, [1898] 2 Q. B. 380. As to consolidation of actions, see Ord. XLIX, r. 8, and *Horwood v. Statesman Publishing Co.* (1929), 141 L. T. 54.

(k) *Phillips v. Claggett* (1843), 11 M. & W. 84.

## § 24. Principal and Agent

1. *Responsibility of principal for agent.*—Any person who authorises or procures a tort to be committed by another is responsible for that tort as if he had committed it himself: *Qui facit per alium facit per se*. "All who procure a trespass to be done are trespassers themselves" (l). Principal and agent, therefore, are jointly and severally liable as joint wrongdoers for any tort authorised by the former and committed by the latter.

2. *Ratification.*—If one person commits a tort while acting on behalf of another, but without his authority, and that other subsequently ratifies and assents to the act so done, he thereby becomes responsible for it, just as if he had given a precedent authority for its commission (m). In other words, the rule that an authority subsequent is equivalent to an authority precedent is applicable not merely in the law of contracts, but in the law of torts also.

3. *Conditions of ratification.*—In order that ratification of an unauthorised act should thus make the principal responsible for it, the following conditions must be fulfilled:—

(a) The wrongful act must have been done on behalf of the principal. No man can ratify an act which was done, not on his behalf, but on behalf of the doer himself. "By the common law", says Coke (n), "he that receiveth a trespasser and agreeth to a trespass after it be done is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." In the case of contracts it has been decided by the House of Lords in *Keighley, Marted & Co. v. Durant* (o) that there can be no ratification unless the agent not merely contracts on behalf of the principal, but also avows that intention at the time. Possibly the same rule applies to torts also (p). But the necessary avowal need not be expressed in words, but may sufficiently appear from the conduct of the parties and the facts of the case. It cannot be necessary for a railway official who

(l) *Wilson v. Tumman* (1843), 6 M. & G. at p. 244; *Brooke v. Bool*, [1928] 2 K. B. 578. Mere passive acquiescence is not authority. "Authority must be something in the nature of active authority" in order to make the principal liable: *Barber v. Pigden*, [1937] 1 K. B. p. 665, per Talbot, J.

(m) *Wilson v. Tumman* (1813), 6 M. & G. p. 242.

(n) Fourth Inst. 317; *Wilson v. Barker* (1833), 4 B. & Ad. 614.

(o) [1901] A. C. 210.

(p) See, however, Lord Robertson's observations, *Keighley, Marted v. Durant*, [1901] A. C. p. 260. See also *Eastern Construction Co. v. National Trust Co.* [1914] A. C. p. 213.



arrests a passenger for defrauding the railway company to state in terms that he does so on behalf of the company.

(b) A second condition of effective ratification is that the principal must know the nature of the act which has thus been done on his behalf, unless, indeed, he is content to dispense with any such knowledge and to approve and sanction the acts of the agent whatever they may be (q). It is sufficient, however, if the principal has such knowledge of the nature of the act as would have sufficed to make him liable had he actually authorised it or done it himself. Mistake or ignorance is no greater defence to a principal who gives an authority subsequent than to one who gives an authority precedent (r).

4. *Act of agent justified by ratification.*—When an illegal act done by one person on behalf of another but without his authority would have been legal had it been done with his authority, it becomes legal *ab initio* if he subsequently ratifies it (s).

An act may be thus justified by ratification, even after the commencement of an action against the agent; but the ratification must in all cases have taken place at a time when the principal still retained the power of lawfully authorising the act to be done (t).

### § 25. Partners

*Partners liable for each other's torts.*—By the Partnership Act, 1890, ss. 10 and 12, it is provided, in affirmance of the common law, that partners are jointly and severally liable for each other's torts committed "in the ordinary course of the business of the firm". Thus, in *Hamlyn v. Houston* (u) a firm was held liable for the act of one of the partners who, on behalf of the firm, induced by bribery a servant of the plaintiff to commit a breach of his contract of service. Whether the act of a partner is one done in the course of the business of the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servant. Indeed, for this purpose we may regard each partner as the servant of the firm.

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(q) *Freeman v. Rosher* (1849), 13 Q. B. 780; *Lewis v. Read* (1845), 13 M. & W. 834.

(r) *Hilbery v. Hatton* (1864), 2 H. & C. 822.

(s) *Whitehead v. Taylor* (1839), 10 A. & E. 210; *Buron v. Denman* (1848), 2 Ex. 167; *Hull v. Pickersgill* (1819), 3 Moore 612.

(t) *Bird v. Brown* (1850), 4 Ex. 786.

(u) [1903] 1 K. B. 81.

### § 26. Masters and Servants

1. *Employer's liability*.—A master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility is recognised by the law. The justification for the rule is public policy. Were the master not liable for his servant's torts a vast number of injured persons would be without effective remedy (*w*).

2. *General conditions of employer's liability*.—In order that this rule of vicarious responsibility may apply, there are two conditions which must co-exist:—

- (a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;
- (b) The servant must in committing the wrong have been acting in the course of his employment.

3. *Who is a servant?*—A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done (*x*).

If we use the term agent to mean any person employed to do work for another, we may say that agents are of two kinds, distinguishable as (1) servants and (2) independent contractors (*y*). It is

(*w*) For the history of the topic and an account of the various streams of doctrine which have joined to create the modern rules, see Holdsworth, *H. E. L.*, viii, 472–82, and Wigmore in 7 *H. L. R.* 383, *A. A. L. H.*, iii, 520–37, *Harvard Essays*, 41–61. For a critical discussion of the justification in ethics of vicarious liability, see Baty's *Vicarious Liability*, ch. viii. See also Bohlen, *Studies*, pp. 65, 67–8, and for French law, see Lawson in *J. C. L.*, Nov. 1940, pp. 50–7, and Amos and Walton, pp. 258 *sqq.*

(*x*) MacKinnon, *L.J.*, in *Hewitt v. Bonvin*, [1940] 1 *K. B.* 191, says this definition can “hardly be bettered”.

(*y*) A distinction is sometimes drawn between agents, servants and independent contractors, as by du Parcq, *L.J.*, in *Hewitt v. Bonvin*, [1940] 1 *K. B.* pp. 194–6 (cp. Halsbury, i, pp. 193–4; Baty, *Vicarious Liability*, p. 38). Those whose employment is more or less continuous are usually called servants, those whose employment is intermittent or confined to a particular occasion agents (*Cl. & L.* p. 65). But, so far as the law of torts is concerned, there is no difference between the position of a servant and an agent in this narrower sense and the distinction is unimportant. All agents are either servants or independent contractors. The *American Restatement*, § 409, says “an agent may be either an independent contractor or a servant, while engaged in work necessary to the exercise of his functions as agent”. The statement of MacKinnon, *L.J.*, in *Hewitt's Case*, *supra*, at p. 191, that if the wrongdoer was the agent, as distinct from the servant, of the defendant, the plaintiff must show that the defendant authorised the act, though in accordance with the views of Sir John Salmond (6th ed.) p. 92, does not seem to be supported by authority, see Winfield, p. 181. Cp. Holdsworth, *H. E. L.*, viii, 227. A vendor is neither an agent nor an independent contractor. If an

for the first kind of agent only that his employer is responsible under the rule which we are now considering. When the agent is an independent contractor, his employer is not, in general, answerable save for torts actually authorised by him expressly or impliedly (z). But when the agent is a servant, his employer will answer not merely for all torts actually authorised, but also for all those which are committed by the servant while engaged in doing his master's business, whether they are authorised or not.

4. *Servant distinguished from independent contractor.*—What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master (a). A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's orders (b).

Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the taxi-driver whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I. So I am responsible for the domestic servants in my house, but I am not responsible for a skilled artisan whom I engage to do a certain job in my house—for example, to paint it (c), or to mend a window. Nor is the employer responsible for a commercial traveller who is paid by commission and sells to such customers as he thinks fit, even if he is also paid £1 a week

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order is placed for 500 fireworks to be manufactured, and the manufacturer finds the material, when the fireworks are delivered, it will be in performance of a contract of sale; but if the material is provided by the person placing the order, the manufacturer is an independent contractor. It is the same as the Roman Law distinction between *emptio-venditio* and *locatio-conductio* D. xviii. 1. 20. (A failure to understand this point has caused confusion to a writer in J. S. P. T. L. (1935), p. 67.) Agency in contract differs from agency in the law of torts.

(z) *Vide infra*, s. 31.

(a) *Performing Right Society, Ltd. v. Mitchell and Booker, Ltd.*, [1924] 1 K. B. 762.

(b) Cp. *Parke, B.*, in *Quarman v. Burnett* (1840), 6 M. & W. p. 509; *Slessor, L.J.*, in *Honeywill and Stein v. Larkin*, [1934] 1 K. B. p. 196.

(c) Even if the painter is supplied with the material and paid by the hour: *Robinson v. Scarisbrick* (1940), 32 B. W. C. C. 285.

towards the cost of his petrol (*d*). Nor is the producer of a variety programme the master of the performers in a turn which he puts on; he is not liable if one of their shoes flies off and hits a member of the audience (*e*).

5. *Hospital staff and school-teachers*.—The question of the liability of hospitals for their staff has caused difficulty and produced conflicting decisions (*f*). But in the light of recent cases the law may now be stated with some confidence to be as follows. Visiting surgeons and physicians are not the servants of the hospital governors (*g*), who will not be liable for their negligence if they have been selected with due care (*h*). But trained nurses, matrons, radiographers and so forth, though skilled, are the servants of the hospital, and for their negligence the hospital authorities, whether it be a voluntary hospital or a council hospital (*i*), will be liable (*k*). “I cannot understand”, said Goddard, L.J., “on what principle a hospital authority is to be exempt from liability if a nurse carelessly administers a dose of poison to a patient instead of medicine, and yet is liable if the cook mixes some deleterious substance in the patient’s food” (*l*). But where a nursing association supplied nurses for nursing private patients and the prospectus showed that the nurses were to be regarded as the servants of the employer they were held not to be the servants of the association (*m*). Similarly the local education authority in the case of a provided school (*n*) and the managers in the case of a non-provided school (*o*) are liable for the torts committed by the teachers who are in the relation of servants to them (*p*).

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(*d*) *Egginton v. Reader* (1936), 52 T. L. R. 212.

(*e*) *Fraser-Wallas v. Waters* (1939), 162 L. T. 136.

(*f*) See Goodhart’s valuable article in 54 L. Q. R. 553, and 55 L. Q. R. pp. 14 and 15. Cp. *Lindsey C. C. v. Marshall*, [1937] A. C. pp. 107–8, 124.

(*g*) *Gold v. Essex C. C.*, [1942] 2 K. B. 293. Whether the same is true of house surgeons and physicians, *quære*, see S.C. pp. 302, 310, 313.

(*h*) *Lindsey C. C. v. Marshall*, [1937] A. C. 97.

(*i*) *Gold v. Essex C. C.*, *supra*, p. 310. Cp. Lord Wright in *Lindsey C. C. v. Marshall*, [1937] A. C. p. 121.

(*k*) *Gold v. Essex C. C.*, *supra*. If the nurses are in the operating theatre, only in very rare cases can they be negligent if they are carrying out the orders of the surgeon or physician: S. C. pp. 299, 305, 313. The authority of *Hillyer v. Governors of St. Bartholomew’s Hospital*, [1909] 2 K. B. 820, is much impaired by *Gold’s Case*. See also *Wardell v. Kent C. C.*, [1938] 2 K. B. 768.

(*l*) *Gold’s Case*, pp. 312–3.

(*m*) *Hall v. Lees*, [1904] 2 K. B. 682.

(*n*) *Smith v. Martin*, [1911] 2 K. B. 775. This case has been criticised by Street, *Ultra Vires*, pp. 265–6, on other grounds.

(*o*) *Ryan v. Fildes*, [1938] 3 A. E. R. 517.

(*p*) By statute the proprietors of hackney cabs are made responsible for the negligence of the drivers to whom the cabs are hired, as if the relationship of master and servant existed between them. In fact, the relationship is that of

6. *Temporary or gratuitous service sufficient.*—One person may be the servant of another although employed not continuously, but for a single transaction only, and even if his service is gratuitous or *de facto* merely. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid; but this is not essential. One person may be the servant of another on a single occasion and for an individual transaction, provided that the element of control and supervision is present (q). Moreover, the service may be merely gratuitous, as when a child acts *de facto* as the servant of his father or the owner of a carriage asks a friend to drive it for him. So in *Pratt v. Patrick* (r) the defendant took two friends, A and B, for a drive in his motor car. A drove the car, and by his negligence B was killed. It was held that B's widow had a right of action against the defendant. In *Parker v. Miller* (s) the Court of Appeal held the owner of the car liable, though the accident happened when he was not himself present, and his friend had left the car standing outside his own house. The test of service is not physical control, but the right to control. But in order to render the owner liable it is necessary to find as a fact that the driver was acting, not for his own purposes, but for those of the owner of the car. If he lent the car to his friend for his friend's purposes he would not be liable. For control means that the journey is the journey of the principal (t).

7. *Effect of lending a servant.*—A servant may have two or more masters at the same time in respect of different employments. In particular a master may lend his servant to another person for a certain transaction so that *quoad* that employment he becomes the servant of the person to whom he is so lent, though he remains for

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bailor and bailee: *Keen & Henry*, [1894] 1 Q. B. 292; *Gates v. Bill*, [1902] 2 K. B. 38; *Bygraves v. Dicker*, [1923] 2 K. B. 585. So by the Carriage of Goods by Sea Act, 1924, Schedule, Art. IV, rule 2, carriers are made responsible for the fault or neglect of stevedores and their servants: *Brown & Co., Ltd. v. T. & J. Harrison* (1927), 96 L. J. K. B. 1025.

(q) *Supra*, s. 26 (3), n. (y).

(r) [1924] 1 K. B. 488. Cp. *Samson v. Aitchison*, [1912] A. C. 844.

(s) (1926), 42 T. L. R. 408. This case is not easy to understand as reported and is doubted by McKerron, p. 62. du Parcq, L.J., explained it in *Hewitt v. Bonvin*, [1940] 1 K. B. pp. 195-6, on the ground that the judge must have drawn the inference that the defendant delegated the task of looking after the car to the driver, who was therefore in charge of the car as his agent and not merely as bailee. And Bohlen (Cleveland Bar Lects. p. 135) says that the decision is reached "by a beautifully logical process". Cp. *Thompson v. Reynolds*, [1926] N. Ir. 131; *Brooke v. Bool*, [1928] 2 K. B. 578; *Barnard v. Sully* (1931), 47 T. L. R. 557; *Laycock v. Grayson* (1939), 55 T. L. R. 698. See *infra*, s. 27 (6).

(t) *Hewitt v. Bonvin*, [1940] 1 K. B. 188; *Britt v. Galmoye* (1928), 44 T. L. R. 294; *Higbid v. Hammett* (1932), 49 T. L. R. 104; *Daniels v. Vaux*, [1936] 2 K. B. 203.

other purposes the servant of the lender. When a servant is sent by his employer to do work for another, it is a question of fact, depending on the nature of the arrangement and the degree of control exercised over the servant, whether he becomes *quoad hoc* the servant of the person for whom he is working (the "*patron momentané*") or remains in all respects the servant of his ordinary employer (the "*patron habituel*"). When a servant has thus two masters, the responsibility for a tort committed by him lies exclusively upon the master for whom he was working when he did the act complained of.

It is not always easy to determine whether this "transmutation of service" has taken place. It is usually said that control is the real test (u). But in *Century Insurance Co. v. Northern Ireland R. T. B.* (w), Lord Wright pointed out that the word 'control' needs explanation and that the true criterion was laid down by Bowen, L.J., in *Moore v. Palmer* (x): "The great test is this, whether the servant was transferred or only the use and benefit of his work?" There is a presumption against any such transfer of the servant (y). In order to effect it there must be an agreement or bargain, even if it be only gratuitous, so that an apprentice of A sent for instruction to work under the orders of B's foreman remains the servant of A (z). But if a master contracts to lend his servants to another and places them under the control of another to do work which he has contracted to do, without retaining the control over the work, they become the servants of that other (a).

Thus, in *Donovan v. Laing Construction Syndicate* (b) the defendants contracted to supply a firm of wharfingers with a crane and a man to work it. This man received directions from the wharfingers or their servants as to the working of the crane, and the defendants had in that respect no control over him. An accident having happened through the negligent management of the crane, it was held that the defendants were not liable, on the ground that the man in charge of the crane was *quoad hoc* the servant of the wharfingers, and that they alone were responsible for him.

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(u) *Bain v. Central Vermont Ry.*, [1921] 2 A. C. p. 416. Cp. *Bull v. West African Shipping Co.*, [1927] A. C. 686; *Leggott v. Normanton* (1928), 140 L. T. 224; *Century Insurance Co.'s Case*, p. 513, per Viscount Simon, L.C.; *Bontex Knitting v. St. John's Garage* (1943), 60 T. L. R. 44.

(w) [1942] A. C. 509.

(x) (1886), 2 T. L. R. p. 782.

(y) Per Lord Wright in *Century Insurance Co.'s Case*, [1942] A. C. p. 517.

(z) *Clelland v. Edward Lloyd Ltd.*, [1938] 1 K. B. 272.

(a) *Donovan v. Laing Construction Syndicate*, [1893] 1 Q. B. p. 694.

(b) [1893] 1 Q. B. 629.

8. Where, on the other hand, the servant of A is appointed by him to do work for B, but remains primarily subject to the control and direction of A, he remains the servant of A, and B is not responsible for him. Thus, in *Quarman v. Burnett* (c) it was held that he who hires horses from a livery-stable keeper, together with a man to drive them, is not responsible for the negligence of the driver; and that this is so even though the defendant habitually engages the same driver, and even if he is the owner of the carriage driven and can give directions as to its destination (d) (e). Although the hirer has a certain measure of control, what is transferred is not the servant, but the use and benefit of the driver's work (f). So the liability of the master for the negligent act of the servant will continue, although at the time the servant is, by direction of the master or by operation of law, under the control of some third party, e.g., when the captain of a ship is under the command of a naval commodore in charge of a convoy. But the master will not be liable if the servant is only doing, without personal negligence, that which he is directed to do by such third party, as when a captain by command of the commodore steams at eight knots in a dense fog. Similarly with nurses acting in the operating room under the orders of the surgeon (g). Such cases differ from those where servants are lent by the employer and placed wholly, though temporarily, in the service of another, as in *Donovan v. Laing* (h).

9. *Superior servant not responsible for subordinates.*—A superior servant is not the master of the inferiors who are under his control, and he is not responsible for their torts. Thus, the head of a Government department or other public official is not responsible for the wrongdoing of servants engaged by him and under his control. The relationship between them is not that of master and

(c) (1840), 6 M. & W. 499.

(d) See also *Cameron v. Nystrom*, [1898] A. C. 308; *Jones v. Liverpool Corporation* (1885), 14 Q. B. D. 890; *Waldock v. Winfield*, [1901] 2 K. B. 596; *Willard v. Whiteley*, [1938] 3 A. E. R. 779 (a case which Winfield (p. 133) appears to doubt); *Lambert v. Constable* (1940), 168 L. T. 194.

(e) In *Jones v. Scullard*, [1898] 2 Q. B. 565, the defendant owned his own horses and carriage, but hired a driver from a livery-stable, and was held liable for his negligence, *Quarman v. Burnett* being distinguished. It is clear that the owner of horses must have a complete right of control over the driver, even when hired from a livery-stable, which is absent if the horses are hired also.

(f) Lord Wright in *Century Insurance Co.'s Case*, *supra*, at p. 516.

(g) MacKinnon, L.J., in *Gold v. Essex C. C.*, [1942] 2 K. B. p. 305.

(h) S.C., per Goddard, L.J., at p. 311. Cf. *Morris v. Winsbury-White*, [1937] 4 A. E. R. 494.

servant; they are fellow-servants of the Crown (i). For the same reason the directors of a company unless they have given express instructions, are not responsible for the torts committed by inferior servants of the company, although those servants are appointed and controlled by the directors, and even though the directors are the sole directors and sole shareholders in the company (j).

10. *Public authorities responsible for their servants.*—The rule of employers' liability extends to trustees and bodies corporate charged with the management of public property and with the exercise of public functions, in the same manner and to the same extent as in the case of private employers, subject, however, to the two following qualifications:—

(a) Such trustees or bodies corporate are in some cases merely departments of the central executive Government, and so mere servants of the Crown, and exempt from liability in accordance with the rule stated in the last paragraph (k).

(b) Such trustees or bodies corporate may be expressly or impliedly exempted from liability for the acts of their servants by the statute under which they exercise their functions (l).

## § 27. The Course of Employment

1. *Master not liable except for acts done in course of servant's employment.*—A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master.

It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one

(i) *Supra*, s. 11.

(j) *British Thomson-Houston Co. v. Sterling Accessories, Ltd.*, [1924] 2 Ch. 33; *Rainham Chemical Works v. Belvedere Guano Co.*, [1921] 2 A. C. p. 476, *per* Lord Buckmaster; *Performing Right Society v. Cyril Theatrical Syndicate*, [1924] 1 K. B. 1. See *Street, Ultra Vires*, pp. 317-8.

(k) *Supra*, s. 13 (7).

(l) See *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93, *supra*, s. 13 (4). Moreover, a subordinate official is not necessarily the servant of a public body simply because he is appointed to his position by that body under a statutory authority or duty in that behalf: *Stanbury v. Exeter Corporation*, [1905] 2 K. B. 638. So the police, though appointed by the Watch Committee of a borough, are not the servants of the borough. They are the servants of the State; *Fisher v. Oldham Corporation*, [1930] 2 K. B. 364. *Aliter*, with the special constables of a railway company: *Lambert v. Great Eastern Ry.*, [1909] 2 K. B. 776. See *Robinson, Public Authorities*, ch. 3.



of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. (In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it.) If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly his master will answer for that negligence, fraud, or mistake (m). “In all these cases”, says the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank* (n), “it may be said that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in”.

On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it (o). He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all. Thus, in *Beard v. London General Omnibus Co.* (p) the defendant company was held not liable for a collision caused by the negligence of the conductor of an omnibus, who, at the end of a journey and in the temporary absence of the driver, took upon himself to drive the omnibus, for the purpose of turning it round for the return journey. Driving an omnibus is not a mode, rightful or wrongful, of performing the duties of a conductor; and the accident happened, not because the conductor failed to perform his own duty, but because without authority he attempted to fulfil

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(m) He will be liable in an action on the case, even if a trespass is an incident in the wrong done. See *Goh Choon Seng v. Lee Kim Soo*, [1925] A. C. 550; *Sharrod v. L. & N. W. Ry.* (1849), 4 Ex. 585.

(n) (1867), L. R. 2 Ex. 259, at p. 266.

(o) The first three sentences of the previous paragraph and this sentence were adopted by the Judicial Committee as a correct statement of the law in *Canadian Pacific Ry. v. Lockhart*, [1942] A. C. p. 599.

(p) [1900] 2 Q. B. 530. Cf. *Rickett v. Thos. Tilling, Ltd.*, [1915] 1 K. B. 644, where the driver in breach of his duty allowed the conductor to drive an omnibus, and the employer was held liable.

that of a driver. So in *Bank of New South Wales v. Owston* (q) it was held by the Judicial Committee of the Privy Council that the arrest and prosecution of offenders is not within the ordinary scope of the authority of a bank manager, and therefore that in the absence of evidence of special authorisation a bank was not responsible for a malicious prosecution undertaken by its manager. On the same principle, in *Abrahams v. Deakin* (r), the owner of a public-house was held not liable for the act of his servant who, while in charge of the bar, gave the plaintiff into custody on a mistaken charge of having attempted to pass bad money.

We may contrast with these cases the decision of the Exchequer Chamber in *Bayley v. Manchester Ry.* (s), in which it was held that the defendant company was liable for the act of a porter in violently putting a passenger out of a railway carriage, under the erroneous belief that he was in the wrong train. Here it was one of the duties of the porter to prevent passengers from travelling in the wrong trains; and, although the plaintiff was in fact in the right train, the act of the porter was merely a wrong and mistaken way of doing the work intrusted to him, and not an unauthorised assumption of work that did not pertain to him. Similarly, it is within the scope of employment of a school-teacher to inflict corporal punishment, and if he inflicts it excessively or in circumstances in which it is not justified, he renders his employers (t) liable for the consequences of his act (u). So also the education authority was held liable where a teacher during school hours sent a girl of fourteen wearing a print pinafore to poke the fire and draw out the damper in a grate of unfamiliar construction in the teacher's common room and the child was burnt. For a teacher's duty is to provide education in its truest and widest sense, and includes the inculcation of habits of order, obedience and courtesy (w).<sup>1</sup> In *Century Insurance Co. v. Northern Ireland Road Transport Board* (x) the driver of a petrol lorry, whilst transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and threw it on

(q) (1879), 4 App. Cas. 270.

(r) [1891] 1 Q. B. 516. See also *Allen v. London & S. W. Ry.* (1870), 6 Q. B. 65; *Goff v. G. W. Ry.* (1861), 3 E. & E. 672; *Edwards v. London & N. W. Ry.* (1870), L. R. 5 C. P. 445.

(s) (1873), L. R. 8 C. P. 148. Cp. *Seymour v. Greenwood* (1861), 7 H. & N. 355.

(t) *Supra*, s. 26 (5).

(u) *Ryan v. Fildes*, [1938] 3 A. E. R. 517.

(w) *Smith v. Martin*, [1911] 2 K. B. 775, 784.

(x) [1942] A. C. 509, following *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281, and in effect overruling *Williams v. Jones* (1865), 3 H. & C. 602.

the floor, and thereby caused a fire and an explosion which did great damage. It was held that his employers were liable. His negligence was negligence in the discharge of his duties. Though the act of lighting his cigarette was done for his own comfort and convenience and was in itself both innocent and harmless, it could not be regarded in abstraction from the circumstances and was a negligent method of conducting his work. The case was the same as if the servant had negligently poured out the motor spirit while some third party had been standing by and lighting his pipe (y).

The authority may be merely inferred from the circumstances. In such cases, in order to make the master responsible, the act must be done in the master's interest, and not for the servant's own purposes. As a general rule a servant has an implied authority upon an emergency to endeavour to protect his master's property if he sees it in danger or has reasonable ground for thinking that he sees it in danger (z). In an emergency a servant may be impliedly authorised to do an act different in kind from the class of acts which he is expressly authorised or employed to do. "If a chauffeur passing his employer's house saw that it was on fire, it would be his duty, or at any rate he would be authorised, to take reasonable steps to protect it from further damage" (a). So in *Poland v. John Parr & Sons* (b) where a carter, whilst off duty, seeing his employers' waggon apparently being robbed by boys, in order to prevent the theft struck one of the boys, who in consequence was run over and lost his leg, the employers were held liable.

2. *Effect of express prohibition.*—Even express prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do. Thus, in *Limpus v. London General Omnibus Co.* (c) the defendant company was held liable for an accident caused by the act of one of its drivers in drawing across the road so as to obstruct a rival omnibus, and it was held to be no defence that the company had issued specific instructions to its drivers not to race with or obstruct other vehicles. The driver whose conduct was in question was engaged to drive,

(y) *Jefferson's Case*, *supra*, at p. 289, *per* Atkin, L.J.

(z) *D'Urso v. Sanson*, [1939] 4 A. E. R. 26.

(a) *Poland v. John Parr & Sons*, [1927] 1 K. B. p. 244, *per* Scrutton, L.J. Cp. *Att.-Gen. v. Siddon* (1880), 1 Cr. & J. p. 228, *per* Bayley, B.

(b) [1927] 1 K. B. 236. This case is doubted by Powell (Agency, p. 11, note) on four grounds, one of which is that since the servant was off duty he could not be said to be in any respect under his master's control.

(c) (1862), 1 H. & C. 526. Cp. *Performing-Right Society v. Mitchell & Booker, Ltd.*, [1924] 1 K. B. 762.

and the act which did the mischief was a negligent mode of driving, for which his employers must answer, irrespective of any authority or of any prohibition. So in *Canadian Pacific Railway v. Lockhart* (d) the employers were held liable where their servant in disobedience to orders not to use uninsured motor cars drove his own uninsured car whilst on a journey for the purpose of the work he was employed to do. "In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment" (e). Prohibition is relevant in considering what the scope of the servant's employment was, and therefore in determining whether the wrongful act was or was not a mode of exercising that employment; but it is powerless to exclude an employer's liability for the wrongful acts of his servant within the sphere permitted to him (f). Where the servant is doing work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it, the master is none the less responsible (g).

8. *Wilful wrongdoing by a servant.*—The liability of a master extends to frauds and other wilful wrongs, no less than to negligence and mistake. If his servant does fraudulently what he is employed to do honestly, the master must answer for the fraud. Thus, in *Barwick v. English Joint Stock Bank* (h) the defendant bank was held liable for a fraudulent representation made to the plaintiff by the manager of one of the bank's branches in relation to the business under his control. "With respect to the question", says Willes, J., delivering the judgment of the Exchequer Chamber (i), "whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible dis-

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(d) [1942] A. C. 591. Cp. *McKean v. Raynor Bros.*, [1942] 2 A. E. R. 650, where at the time of the accident the servant was driving his father's private car when he had been ordered to drive the firm's car. In *Lockhart's Case* the Judicial Committee said (at p. 601) that if the servant had been absolutely forbidden to drive his motor car in the course of his employment, it might well have been maintained that he was not employed to drive a motor car, and that therefore the driving of a motor car was outside his employment. But it seems that the principle of the cases would not support such a defence. Cp. also *Ryan v. Fildes*, [1938] 3 A. E. R. p. 523 (infliction of corporal punishment).

(e) *Lockhart's Case*, ubi supra, p. 600.

(f) *Barnes v. Nunnery Colliery Co., Ltd.*, [1912] A. C. 44; *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A. C. 62; *Moore & Co. v. Donnelly*, [1921] 1 A. C. 329. These are authorities on the Workmen's Compensation Act, but the principle is equally applicable to the common law liability of an employer to third persons.

(g) *Goh Choon Seng v. Lee Kim Soo*, [1925] A. C. p. 334.

(h) (1867), L. R. 2 Ex. 259.

(i) *Ibid.* p. 265.

inction can be drawn between the case of fraud and the case of any other wrong”.

It was long supposed that where the fraud or other wilful wrongdoing of the servant was committed for his own benefit and not on his master's behalf, his master was not responsible. It was, however, decided by the House of Lords in *Lloyd v. Grace, Smith & Co.* (k) that this is not the case, and that so long as a servant is acting within the scope of the employment intrusted to him, his employer is liable for all frauds committed by that servant, whether for the benefit of the employer or for his own profit. In this case a solicitor's managing clerk induced a client to transfer a mortgage to him by fraudulently misrepresenting the nature of the deed of assignment, and thereupon obtained and misappropriated the mortgage-moneys. The solicitor was held liable to his client for the fraud, although it was committed solely for the benefit of the fraudulent servant himself.

It has since been decided in *Uxbridge Permanent Benefit Building Society v. Pickard* (l) that the employer is similarly liable even though the fraud involves a forgery and even though the victim of the fraud is not a client but a third person who is damnified by relying on the apparent or ostensible authority possessed by the clerk. It is not within the actual authority of a clerk to commit fraud, but it is within his ostensible authority, and so long as he is acting within the scope of his ostensible authority the employer will be bound whether he is acting for his own purposes or for his employer's purposes.

Although the decision in *Lloyd v. Grace, Smith & Co.* (m) came as a surprise at the time it was given, the facts in these cases would seem to be covered by the principle enunciated by Holt, C.J., in *Hern v. Nichols* (n), one of the very earliest cases in which vicarious liability was imposed in English law. “Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger” (o).<sup>✓</sup> Where, however, there is no authority, actual or

(k) [1912] A. C. 716, overruling the dicta to the contrary of Bowen, L.J., in *British Mutual Banking Co. v. Charnwood Forest Ry.* (1887), 18 Q. B. D. at p. 718, and of Lord Davey in *Ruben v. Great Fingall Consolidated*, [1906] A. C. at p. 465. See *Reckitt v. Barnett*, [1928] 2 K. B. at p. 257, per Scrutton, L.J.

(l) [1939] 2 K. B. 248.

(m) [1912] A. C. 716.

(n) (c. 1700), 1 Salk. 289.

(o) The statement of the effect of *Lloyd v. Grace, Smith & Co.* has been somewhat recast since the last edition, though the statement there given was referred to without disapproval by Hilbery, J., in *British Railway Traffic Co. v. Roper* (1939), 162 L. T. p. 221. For another view see Winfield, pp. 140-1.

apparent, the master will not be liable for the wilful and deliberate torts of his servant. "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable" (p). In such a case no question arises of any actual or ostensible authority on the faith of which a third person has changed his position. Such acts are treated as acts of the servant's own, in order to effect a purpose of his own, and so not within the scope of his employment. So in *Joseph Rand, Ltd. v. Craig* (q) the defendant employed his servants to cart refuse, and to deposit it in a certain place set apart for that purpose. In order to save themselves trouble, and not for the benefit of their master, those servants wrongfully deposited the refuse upon the plaintiff's premises instead of carrying it further to its proper destination. It was held by the Court of Appeal that these trespasses were not acts done in the course of the employment so as to render the master liable.

Where there is no ostensible authority the third person is put on inquiry as to whether there is any actual authority, and, if there is not, the master will not be liable. So the third person must be taken to know that the master of a ship has no authority to sign a bill of lading for goods which have not been shipped, that a secretary of a company can only sign documents which he is in fact authorised by the directors to sign, and that a solicitor has no authority to alter his client's cheques (r).

Whether the act is within the scope of the agent's authority should be tested, if he has a permanent employment, by reference to the ordinary duties of that employment, which he clearly cannot extend by a fraudulent act. If it is an agency authorising a special act, the agent will not bind the principal to an extent beyond that

(p) *Groft v. Alison* (1821), 4 B. & Ald. p. 592, *per cur.* So in *Limpus v. L. G. O. C.* (1861), 2 F. & F. 640, Martin, B., directed the jury that the defendants would not be liable if their driver's act was wilful and deliberate, i.e., if it was done designedly and with the intention of striking against the omnibus and injuring it; and in the same case in the Exchequer Chamber (1862), 1 H. & C. p. 543, Blackburn, J., said that if the driver "did the act, not to further his master's interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible".

(q) [1919] 1 Ch. 1.

(r) *Grant v. Norway* (1851), 10 C. 3. 665; *Slingsby v. District Bank*, [1931] 2 K. B. 688; [1932] 1 K. B. 544; *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation* (1934), 151 L. T. 1; *London Permanent Benefit Building Society v. Pickard*, [1939] 2 K. B. p. 258. Would the defendants in the *Kleinwort Case* have been liable if their secretary had acted negligently instead of fraudulently, *quære*? See 177 L. T. Jo. 219. See also Powell, *Agency*, pp. 119-23.

which is reasonably to be inferred from the nature of that special employment and the duties incident to it (rr).

*Thefts by servants.*—The liability of a master for thefts committed by his servants of property bailed to the master or otherwise committed to his charge is a matter of doubt. It used to be supposed that a bailee is not responsible for the loss of the property by theft, even though the thief is the bailee's own servant, unless the bailee has given occasion to the theft by his own negligence or by that of some other servant employed to take care of the property. So in *Cheshire v. Bailey* (s) the plaintiff, a silversmith, hired from the defendant a brougham, horse, and man for the purpose of driving the plaintiff's traveller about London with samples of the plaintiff's wares to be shown to customers. While the traveller was temporarily absent in the course of his business, the coachman, acting in collusion with thieves, drove the brougham to a place where the samples were stolen by the thieves. It was held by the Court of Appeal that the defendant, the coachman's employer, was not liable, the coachman in so conspiring with thieves being no longer acting within the scope of his employment. In the earlier case of *Abraham v. Bullock* (t), on the other hand, the facts were exactly the same, save that the coachman, in permitting the theft, was acting negligently and not fraudulently; and it was held that his employer was liable. Since the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* (u) this distinction is apparently immaterial. It would appear (unless the general principle of an employer's liability for torts is modified in cases of bailment by the express or implied terms of the contract) that the responsibility of the bailee must depend on whether the servant by whom the theft is committed is one to whom the charge or custody of the thing stolen has been intrusted by his master. If such a servant steals the thing intrusted to him, he is acting nevertheless in the course of his employment—he is doing fraudulently what he is employed to do honestly—and his employer is liable. But if the theft is committed by a servant to whom the property has not been intrusted, the theft is outside the scope of his employment, and the master is not responsible unless he has been negligent in the selection of the

(rr) *Bradford Building Society v. Borders*, [1941] 2 A. E. R. p. 211, per Lord Maugham.

(s) [1905] 1 K. B. 237. Cp. *Giblin v. McMullen* (1868), L. R. 2 P. C. 317.

(t) (1902), 86 L. T. 796. Cp. *Bontex Knitting Works, Ltd. v. St. John's Garage* (1943), 60 T. L. R. 44.

(u) [1912] A. C. 716.

servant or the theft has been induced by his own negligence or by the negligence of some other servant to whom the charge of the property has been committed (w).

4. *Unauthorised use of master's property for servant's purposes.*—A master is not responsible for the negligence of his servant in the unauthorised use of his master's property for the servant's own purposes. This rule has been applied on several occasions when harm has been done by the negligent driving of servants while using their masters' horses and conveyances for their own ends.

Accordingly, in *Mitchell v. Crassweller* (x) the defendant's servant was engaged to drive a cart, and on returning to his employer's premises at the end of his day's work it became his duty to take the horse and cart to the stables. Instead of doing so he drove away on a new journey for his own purposes exclusively; and while returning he injured the plaintiff by negligent driving. It was held that the defendant, his master, was not liable (y).

*Servant engaged both on his master's business and on his own.*—It is to be observed, however, that if the servant is really engaged on his master's business, the fact that he is at the same time engaged on his own is no defence to the master, even though it was the competing claims of the servant's business which caused him to perform his master's negligently. The master is exempt only when the servant was exclusively on his own business. If while driving his master's cart in the course of his employment he lights his pipe, and while so engaged causes a collision by not looking where he is going, his master will be liable; and it will be no defence to him to allege that the servant in lighting his pipe was engaged on his own business and not on his master's; for he was in truth engaged on both (z). So where a carman deviates for his own purposes from the direct line which he ought to have followed in the execution of his master's business, and an accident happens while this deviation still continues, it is a question of degree whether the deviation is so great that the servant can no longer be said to be driving on his master's

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(w) It does not seem clear why the coachman in *Cheshire v. Bailey* was not doing dishonestly what he was employed to do honestly, but that case was expressly approved by Lord Shaw in *Lloyd v. Grace, Smith & Co.* (at p. 741), and was followed by Lord Reading, C.J., in *Mintz v. Silverton* (1920), 36 T. L. R. 399. It was also mentioned without disapproval by the Court of Appeal in *Williams v. Curzon Syndicate* (1919), 35 T. L. R. 475. See also Hanbury, *Essays*, pp. 151–2.

(x) (1853), 13 C. B. 237.

(y) *Cp. Storey v. Ashton* (1869), L.R. 4 Q. B. 476; *Rayner v. Mitchell* (1877), 2 C. P. D. 357; *Sanderson v. Collins*, [1904] 1 K. B. 628.

(z) *Vide supra*, s. 27 (1).



business, but to be on a journey of his own, or whether, on the other hand, the deviation is so slight that it may be said to be part of the journey on which his master sent him. In *Joel v. Morison* (a), Parke, B., said: "If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. . . . If [the servant] was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." So in *Storey v. Ashton* (b), Cockburn, C.J., said: "I am very far from saying, if the servant, when going on his master's business, took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey".

*Unauthorised use of property bailed to employer.*—Where the servant makes unauthorised use of property which has been bailed to his employer it is submitted that different considerations will apply in determining whether his master is involved in liability according as it is a third party or the bailor who is the plaintiff. In *Aitchison v. Page Motors* (c) the plaintiff had sent her car to the defendants' garage for repair. The defendants sent the car to the manufacturers, and the defendants' servant went to fetch it back after it had been repaired. Instead of taking it directly back to his employers' garage he for his own private purposes took some friends for a ride and was owing to his negligence involved in an accident in which he was killed and the car damaged beyond repair. It was held by Macnaghten, J., that the defendants were liable to the plaintiff for the value of the car. The servant was acting in the course of his employment in fetching the car and the defendants were liable for the manner in which he conducted himself in performing that service. But it is difficult to believe that had a bystander been injured as a result of the accident in this case he would have had a remedy against the employers. Had a bystander been the plaintiff it would assuredly have been held that the servant

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(a) (1834), 6 C. & P. p. 503.

(b) (1869), L. R. 4 Q. B. p. 479.

(c) (1935), 154 L. T. 128. Cp. *Central Motors (Glasgow), Ltd. v. Cessnock Garage and Motor Co.*, [1925] S. C. 796. Contrast *Sanderson v. Collins*, [1904] 1 K. B. 628 (where the coachman had started out on a fresh expedition of his own), and see 6 Camb. L. J. pp. 256-8. But see Beven, ii, 976-7.

was going on a frolic of his own. It is suggested that it is the flavour of contract involved in the bailment which created the liability, as in *Lloyd v. Grace, Smith & Co.* (d).

5. *Servant's negligence contemporaneous with his employment.*—A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed *at a time* when the servant is engaged on his master's business. It must be committed *in the course* of that business, so as to form a part of it, and not merely coincident in time with it. So if my chauffeur whilst in charge of my car lit his pipe and threw away a lighted match which set fire to some hay, I should not be liable (e).

6. *Permission distinguished from employment.*—On the same principle, a master is not responsible for the negligence of his servant while engaged in doing something which he is *permitted* to do for his own purposes, but not *employed* to do for his master. I am liable only for what I employ my servant to do for me, not for what I allow him to do for himself. If I permit my servant for his own ends to drive my car, I am not liable for his negligence in doing so (f). In this respect he is not my servant, but a mere bailee to whom I have lent my property; and there is no more reason why I should answer for his conduct in such a matter than why I should answer for that of my friends or my children to whom, without personal negligence on my own part, I lend or intrust property that may be made the instrument of mischief (g).

## § 28. The Rule of Common Employment

1. *Master not responsible to his own servant for negligence of fellow-servant.*—A master is not responsible for negligent harm done by one of his servants to a fellow-servant engaged in a common employment with him (h). This rule, indeed, has been to

(d) [1912] A. C. 716. *Vide supra*, s. 27 (3).

(e) Cp. the South African case *M'Bara v. Landrey*, [1917] C. P. D. 599; McKerron, p. 108. *Williams v. Jones* (1865), 3 H. & C. 602, however, can no longer be regarded as law, *vide supra*, s. 27 (1), n. (x).

(f) *Britt v. Galmoye* (1928), 44 T. L. R. 394. *Vide supra*, s. 26 (6), n. (t).

(g) In *Ruddiman v. Smith* (1889), 60 L. T. (N.S.) 208, the defendants were held liable by a Divisional Court for the act of a clerk who after office hours washed his hands in the lavatory and left the tap turned on. It is not easy to see, however, how the clerk in such circumstances could be said to be engaged on his master's business. The case may, however, perhaps be explained on the ground of absolute liability for a nuisance. See Cl. & L. p. 79.

(h) Winfield, p. 142, states the rule in much wider terms, but the doctrine of common employment is one application of the rule which he states, not the rule itself.

a large extent superseded by statute—the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 to 1925—but these Acts do not apply to all forms of employment, and the common-law principle is therefore still applicable in many instances. The rule was first applied in *Priestley v. Fowler* (i), and first definitely formulated in *Hutchinson v. York and Newcastle Ry.* (k). Hence it has been said that "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase" (kk).

2. *Reason of rule.*—The reason alleged for this exemption of the employer from liability to his own servants is that there is an implied term in the contract of service that a servant agrees to run the risk naturally incident to the employment undertaken by him, and that one of these risks is that of harm due to the negligence or incompetence of his fellow-servants. "When several workmen", said Lord Cranworth (l), "engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." Though this supposition is "nowadays a sheer fiction" (m), it is now accepted as the true basis of the rule (n) and it is a fundamental principle that there must be a contract, express or implied, between the employer and employee so that it may be possible to imply the term from the nature and circumstances of the contract (o). Where there is no contract,

(i) (1837), 3 M. & W. 1. See the discussion of this case by Bohlen in 20 H. L. R. pp. 27–34, Harvard Essays, pp. 510–17, Studies, pp. 459–67; Green, Judge and Jury, pp. 106–14; 29 Col. L. R. 255. See also the historical treatment of the doctrine by Lords Atkin and Wright in *Radcliffe v. Ribble Motor Services*, [1939] A. C. pp. 224 sqq., 298 sqq. The leading cases are *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. 266, and *Bartonshill Coal Co. v. McGuire* (1851), 3 Macq. 300.

(k) (1850), 5 Ex. 343.

(kk) Kenny, Cases on Tort, p. 90.

(l) *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. 266, at p. 295.

(m) Lord Macmillan in *Radcliffe's Case*, *supra*, at p. 235. Cp. Goddard, L.J., in *Alexander v. Tredegar Iron Co.*, [1944] K. B. p. 394.

(n) Lord Atkin, *ibid.*, p. 227. Cp. du Parc, L.J., in *Pollock v. Charles Burt, Ltd.*, [1941] 1 K. B. pp. 128–9. Salmond regarded the rule as an application of the maxim *volenti non fit injuria* (cp. Lord Maugham in *Wilsons and Clyde Coal Co. v. English*, [1938] A. C. p. 86). But we must remember that *sciens* is not the same as *volens*. (*Supra*, s. 8; cp. Lord Wright in *Radcliffe's Case*, *supra*, p. 239; 1 Mod. L. R. 228; 2 Mod. L. R. 47–8.) The rule has also been said to be a positive rule of law with regard to the relations of employer and employee. *Burr v. Theatre Royal, Drury Lane*, [1907] 1 K. B. p. 555 (*per* Collins, M.R.); *Fanton v. Denville*, [1932] 2 K. B. p. 325 (*per* Scrutton, L.J.). Cp. Chapman in 2 Mod. L. R. 292 (whose argument is contrary to Lord Atkin, *ubi supra*, p. 228). But this explanation of the rule is specifically denied by Lord Wright, *ubi supra*, p. 247.

(o) Lord Wright in *Radcliffe's Case*, p. 247.

*e.g.*, where a workhouse inmate is ordered to do work (*p*) or a pilot is employed under compulsion of law (*q*) it has been held that there is no basis on which to found the implied term; on the other hand in *Alexander v. Tredegar Iron and Coal Co., Ltd.* (*qq*) it was held by the Court of Appeal that where a workman is retained in or directed to his employment by the Minister of Labour under the Essential Work Order, even if it be against his will, the doctrine applies, though there is in such a case no freedom of contract between master and servant. If the Essential Work Order destroyed the contract of service it would have involved that in such a case the master would not be vicariously liable for the defaults of his employee. Any other decision would have wrought great confusion.

Again, the rule applies even though the servant injured is an infant, for a contract of service, containing the provisions usual in the particular trade, is regarded as beneficial to the infant, and there is no difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection (*r*). But if the contract is manifestly to the disadvantage of the infant he cannot be bound by it (*s*) and the position of a child of tender years who cannot safely be trusted near dangerous machinery is in a different category from that of a young workman, capable of using intelligence and skill (*t*).

3. *Conditions of exemption of employer.*—Two conditions must be fulfilled before this rule of exemption from liability is applicable:—

- (a) The servant injured and the servant causing the injury must be fellow-servants—*i.e.*, they must be servants of the same master;
- (b) They must at the time of the accident have been engaged in a common work.

4. *Who are fellow-servants.*—In the first place, then, they must be fellow-servants. It is not enough that they were working together and engaged in the same transaction, unless with respect to that transaction they were employed by the same master. If A

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(*p*) *Tozeland v. West Ham Union*, [1906] 1 K. B. 538.

(*q*) *Smith v. Steele* (1875), L. R. 10 Q. B. 125.

(*qq*) [1944] K. B. 390. Contrast *Read v. Lyons & Co.* (1944), 170 L. T. 418; S. C. on appeal, 61 T. L. R. 148; and see 60 L. Q. R. pp. 207, 212.

(*r*) *Young v. Hoffmann Manufacturing Co.*, [1907] 2 K. B. 646; *Cribb v. Kynoch*, [1907] 2 K. B. 548. See S. & W. pp. 305-10.

(*s*) *Young's Case*, *ubi supra*, p. 654, *per* Barnes, P. Cp. *Olsen v. Corry* (1936), 155 L. T. 512.

(*t*) *Holdman v. Hamlyn*, [1943] K. B. pp. 669-70, *per* du Parcq, L.J.

engages an independent contractor B, and the servants of both A and B work together at the same job, A is liable for any harm done by his servants to the servants of B, and B is similarly liable to the servants of A (u).

Servants are fellow-servants within the meaning of this rule even though one of them is the superior of the other (v). The master of a ship is a fellow-servant with the members of his crew, and the foreman of a factory with the artisans under his charge. The directors or other superior agents or representatives by whom a corporation fulfils its functions are not, however, the fellow-servants of the inferior servants of the corporation for the purpose of this rule. For this, and indeed for other purposes also, the acts of those superior agents or representatives are treated in law as the acts of the corporation itself, rather than those of its servants (w). Otherwise a corporation would always be exempted at common law by the rule of common employment from liability to its own servants. So neither the owner of a colliery nor the agent carrying out the owner's obligations is engaged in a common employment with the miners who work in the colliery (x). But if a director acts as a foreman for the time being and is not doing so as representing the board of directors he becomes for the time being a fellow-servant (y).

5. *Volunteers*.—It has been held that the principle also applies to any person who, on his own initiative (z), or at the request of a servant or his master (a), gratuitously and temporarily assists the servant in his work. By such assistance he puts himself *quoad hoc* in the position of a fellow-servant of the servant assisted by him, and therefore precludes himself from suing the employer for any

(u) *Johnson v. Lindsay*, [1891] A. C. 371; *Cameron v. Nystrom*, [1893] A. C. 308.

(v) *Hedley v. Pinkney & Sons*, [1894] A. C. 222; *Wilson v. Merry* (1868), L. R. 1 H. L. Sc. 326; *The Napier Star*, [1899] P. p. 341.

(w) See *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A. C. 705; *supra*, s. 13 (8).

(x) *Wilson's Case*, [1938] A. C. at p. 76, *per* Lord Macmillan. Cp. mate and shipowners: *McLeod v. Hastie*, [1936] S. C. 501.

(y) *Bloor v. Liverpool Derricking Co.*, [1936] 3 A. E. R. 399.

(z) *Degg v. Midland Ry.* (1857), 1 H. & N. 773.

(a) *Poiter v. Faulkner* (1861), 1 B. & S. 800. In *Bass v. Hendon U. D. C.* (1912), 28 T. L. R. 817, a boy of fourteen was invited as a volunteer to help pull a fire-escape and was injured by the negligence of one of the men in charge of the escape. It was held by the Court of Appeal that the defence of common employment was an answer to his action. This decision was followed by *McCardie, J.*, in *Heasmer v. Pickfords* (1920), 36 T. L. R. 818, and by *Atkinson, J.*, in *Bromiley v. Collins*, [1936] 2 A. E. R. 1061. But these cases seem inconsistent with *Holdman v. Hamlyn*, [1943] K. B. 664 (*supra*, s. 28 (2)), and Goodhart regards them as "definitely overruled" by it: 60 L. Q. R. p. 4.

harm resulting. Thus, in *Degg v. Midland Ry.* (b) the servants of the defendant company were engaged in turning a truck on a turntable, when a stranger, noticing their difficulty in doing the work, voluntarily gave his assistance, and while doing so was crushed and killed by an engine negligently driven by another servant of the company. It was held that the defendants were under no liability. But Lord Wright has pointed out (c) that the fundamental principle upon which the doctrine of common employment is based is that "there must be an actual contract (d) between the employer and employee so that it may be possible from the nature and circumstances of the contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees". The cases on volunteers have never come before the House of Lords. If they are right, they can only be regarded (he says) as special exceptions to the general rule. The cases were subsequently considered by du Parcq, L.J., in *Holdman v. Hamlyn* (e) and the conclusion to be drawn as the law stands is that if the volunteer acted on his own initiative (f) or at the request of a servant, without the consent or knowledge of the master (g), he will be unable to recover, not because of the doctrine of common employment, but because he is a trespasser in the sense that he officiously and illegally meddled with what was no concern of his (h); if he acted on the invitation of the master or a servant with authority to issue the invitation the doctrine of common employment will apply and he will be unable to recover unless the express terms of the contract or the facts of the case excluded the possibility of implying the undertaking to run the risk of his fellow-servants' negligence.

On the other hand, if the person so injured while assisting the defendant's servants is not a mere volunteer, but is engaged in forwarding some business of his own in which those servants are engaged, he is no fellow-servant of theirs, and is entitled to hold their employer responsible for their negligence towards him. Thus,

(b) (1857), 1 H. & N. 773.

(c) *Radcliffe v. Ribble Motor Services*, [1939] A. C. p. 247.

(d) By this Lord Wright must mean a contract, express or implied.

(e) [1943] K. B. 664. Cp. Scrutton, L.J., in *Hayward v. Drury Lane Theatre*, [1917] 2 K. B. pp. 911 *sqq.*, Neville, J., in *S.C.* p. 917; McCardie, J., in *Heasmer v. Pickfords*, *ubi supra*; Winfield, pp. 146-7.

(f) As in *Degg's Case*.

(g) As in *Potter v. Faulkner*, *ubi supra*.

(h) du Parcq, L.J., took a different view of *Degg's Case* in *Pollock v. Charles Burt, Ltd.*, [1941] 1 K. B. pp. 131-2.

in *Wright v. London and N. W. Ry.* (i) the plaintiff assisted the defendants' servants to shunt a horse-box containing a heifer belonging to him, and while so engaged he was run over by a train, and it was held that the company was liable.

We have seen (j) that A may lend his servant to B for a particular purpose, so as to make him *quoad hoc* the servant of B, who thereby becomes liable to third parties. But the servant does not thereby become the fellow-servant of B's servants, for he has no contract of employment with B, and cannot have agreed by an implied term that B shall not be liable to him for his injury by the tort of B's other, and undoubted, servants (k).

6. *What is common employment?*—The second condition requisite for the exemption of the master is that of common employment. It is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured; it is necessary also that these two should have been engaged in a common work. It is not meant by this that their work must be identical in nature. Work is said to be common within the meaning of this rule when the workmen are so connected with each other that the risk of an accident due to the conduct of one of them is a natural incident of the work of the other, so that such risk must be deemed to have been in the contemplation of the servant when he undertook that work. Even when two servants are doing entirely different work, the mere fact that they are working together at the same time and place may be sufficient to make their employment common. If an accountant is engaged to keep books in a dynamite factory his employers will be free from liability at common law if he is killed by an explosion due to the negligence of a fellow-servant engaged in the manufacture. Further, though servants engaged in different departments of duty are in general not in common employment (l), work may be common even though conducted at different times and in different places, for it may be so connected that the safety

(i) (1876), 1 Q. B. D. 252; *Lomas v. M. Jones & Son*, [1944] K. B. 4. See also *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K. B. 899; *Murphy v. Ross*, [1920] 2 Ir. R. 199; *Maidment v. Cohen* (1938), 60 Ll. L. R. 245; Winfield, pp. 148-9.

(j) *Supra*, s. 26 (7).

(k) *Lambert v. Constable* (1940), 163 L. T. 194. Salmond thought otherwise (6th ed.), p. 113, and so, *semble*, Lord Wright in *Century Insurance Co. v. N. I. R. T. B.*, [1942] A. C. p. 516.

(l) Lord Wright in *Radcliffe's Case*, pp. 238, 243 (where he gives examples). Cp. Unger in 2 Mod. L. R. 43. *Pollock v. Charles Burt, Ltd.*, [1941] 1 K. B. 121, is an application of this principle, but it has been trenchantly criticised, 57 L. Q. R. 444.

of the one servant is committed to the care and skill of the other. The driver of a train, for example, is engaged in a common work with the signalman who regulates the traffic, and with the superintendent who is responsible for the repair of the line, and with the engineer whose duty it is to see that the machinery and plant are in safe condition; for he who undertakes to drive a train knows that he is intrusting his life to the care and competence of these fellow-servants, and has impliedly taken upon himself the risk of their default (m). "It is necessary", said Blackburn, J., in *Morgan v. Vale of Neath Ry.* (n), "that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others."

If, on the other hand, the work is not so connected, the master is responsible even at common law for harm done by one of his servants to the other. "If the risk from the fellow-servant's negligence is accidental, and not incidental to the employment, if the men are engaged to act on independent jobs which do not necessarily or in the ordinary course bring them into relation, if the risk from the fellow-servant is only the same risk as from men employed by other masters in the same type of occupation, there is *prima facie* no case of common employment" (o). Thus it has been held that seamen engaged on different ships belonging to the same owner are not in common employment (p). So also in *Radcliffe v. Ribble Motor Services* (q) two motor-coach drivers, servants of the same employers, who were allowed to choose their own routes home after a common journey to New Brighton, were held not to be in common employment when an accident happened at Liverpool on the return journey. The one driver "was no more interested in the skill of the other than in that of the drivers of the myriads of other vehicles in whose vicinity he might happen to drive" (r). "The risk was

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(m) But a man employed as a carpenter in repairing a stationary railway-carriage on a siding is not in common employment with the engine-driver of another engine: *M'Naughton v. Caledonian Ry. Co.* (1857), 19 D. 271, approved in *Radcliffe's Case*, [1939] A. C. 227, 243, 249. Cp. *McGovern v. L. M. & S. Ry.*, [1944] 1 A. E. R. 730 (engine-cleaner not in common employment with a shunter).

(n) (1864), 5 B. & S. at p. 580. Common work is "work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other": *per* Lord Wright in *Radcliffe v. Ribble Motor Services*, [1939] A. C. p. 249.

(o) Lord Wright in *Radcliffe's Case*, *supra*, at pp. 251-2.

(p) *The Petrel*, [1893] P. 320.

(q) [1939] A. C. 215.

(r) Lord Atkin at p. 232.



the general risk of the highway, not the specific risk of the fellow-servant's negligence" (s).

*Common employment must exist at time of accident.*—It is to be noticed, further, that the servant injured must have been engaged in the common work at the time of the accident; for otherwise the risk cannot be said to have been an incident of that employment. If a conductor of an omnibus, while doing his work, is injured by the negligence of the driver, he will have no remedy against his employers; but if he is run down by the omnibus while he is crossing the street on a holiday granted to him by his employers, they will presumably be liable to him (t). For this purpose, however, a servant is engaged in his employment not merely while actually at work, but also while going to or from his work, so long as he is on his employer's premises or is using means of access provided by the employer and under his control (u), but not it seems if he is going by a route which he is merely permitted by his employer to use (v).

7. *Master liable for his own negligence.*—A master, although he is not responsible to his servant for the negligence of a fellow-servant, is yet responsible for his own negligence; and for this purpose it is personal negligence to omit to use reasonable care and skill (1) in choosing competent and careful servants and in dismissing those who prove themselves incompetent and careless (w); (2) in providing proper and suitable plant; (3) in providing a proper and safe system of working. The master cannot absolve himself from the duty to take due care in the provision of a reasonably safe system of working or proper plant by the appointment of a competent person to perform the duty. He may appoint someone as his agent in the discharge of the duty, but he will remain responsible for him under the maxim *respondent superior* (x). The master does not "warrant the adequacy of the plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But

(s) Lord Wright at p. 254. The same principle was applied by the Court of Appeal in *Metcalfe v. L. P. T. B.* (1939), 160 L. T. 599, where a bus and a tram travelling along known and fixed routes collided. Hypothetical instances of work that is not common are given in *Radcliffe's Case* at pp. 232 (Lord Atkin), 235 (Lord Macmillan), and 250 (Lord Wright).

(t) See *Tunney v. Midland Ry.* (1866), L. R. 1 C. P. 291; *Hutchinson v. York and Newcastle Ry.* (1850), 5 Ex. p. 352.

(u) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A. C. 77.

(v) *McGovern v. L. M. & S. Ry.*, [1944] 1 A. E. R. 730.

(w) *Butler v. Fife Coal Co.*, [1912] A. C. 149.

(x) *Wilsons and Clyde Coal Co. v. English*, [1938] A. C. 57, pp. 64-5, 73, 86.

it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill" (y). It is not always easy to distinguish between the failure to provide proper plant and a safe system and the casual negligence of a foreman or other employee in misusing or failing to keep in order proper plant or departing from a safe system (z), or to determine what differentiates the function of the agent by whom the employer provides the system and of the fellow-workman who is charged with carrying out a system that has been provided. The answer seems to be that it is the distinction between "what is permanent or continuous on the one hand, and what is merely casual and emerges in the day's work on the other hand" (a). Again, where the employee is working on premises which are not in the occupation of the employer, it is necessary to distinguish between responsibility for the safety of the premises (which lies upon the occupier) and responsibility for having a proper system of work (which lies upon the employer) (b).

A corporation, though it cannot act except through its servants or agents, may nevertheless have personal negligence imputed to it within the meaning of this rule. The negligence of the supreme governing authority of the corporation, or the negligence of officers to whom its general powers have been delegated (e.g., the directors of a company) (c), is in law the negligence of the corporation itself; and if one of its servants is injured thereby, his remedy against the corporation is not excluded by the defence of common employment (d).

#### 8. Cases of absolute liability.—The defence of common employ-

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(y) *S.C.* at p. 78, per Lord Wright.

(z) *Id.*, *ibid.*, pp. 84-5. Cp. Langton, J., in *The Napier Star*, [1939] P. p. 342.

(a) *Wilsons and Clyde Coal Co. v. English*, [1936] S. C. p. 904. The whole question is elaborately discussed in *Speed v. Thomas<sup>2</sup> Swift*, [1943] K. B. 557. The negligence was held to be casual in *The Napier Star*, [1939] P. 330, and *O'Melia v. Freight Conveyors*, [1940] 4 A. E. R. 516, and *Fanton v. Denville*, [1932] 2 K. B. 309, the *ratio decidendi* in which was overruled in *Wilsons' Case*, [1938] A. C. 57, was said to be supportable on the facts upon this ground (see pp. 72, 77, 88); the system was held to be defective in *Olsen v. Corry* (1936), 155 L. T. 512; *Grantham v. N. Z. Shipping Co.*, [1940] 4 A. E. R. 258; *Lovell v. Blundells*, [1944] K. B. 502; *Callaghan v. Kidd*, [1944] K. B. 560; and in *Wilsons' Case* (*ubi supra*). A system which is safe at the beginning of a job may require modification as the work proceeds: *Speed v. Thomas Swift*, [1943] K. B. pp. 562-3; *Porter v. Port of Liverpool Stevedoring Co.*, [1944] 2 A. E. R. 411.

(b) Similarly an employer is liable to his servant who, whilst working on someone else's premises, is injured as a result of a darkened open hatchway: *Garcia v. Harland & Wolff*, [1943] K. B. 731, 742; but not if he is injured owing to the collapse of a floor: *Taylor v. Sims & Sims* (1942), 167 L. T. 414.

(c) *Vide supra*, s. 13 (3).

(d) See, for example, *Butler v. Fife Coal Co.*, [1912] A. C. 149; *Wheeler v. New Merton Board Mills*, [1933] 2 K. B. 669; *Knoit v. L. C. C.*, [1934] 1 K. B. 126.

ment is not open to an employer when the cause of action against him is based on the breach of some absolute statutory duty to provide for the safety of his employees (e) (f). In *Groves v. Wimborne* (g) a master was accordingly held liable for an injury suffered by one of his servants through the absence of sufficient fencing around dangerous machinery, although there was no personal negligence on the master's part, and the fencing had been wrongfully removed by one of his other servants; for the statutory duty to maintain such fencing was absolute. An employer is not necessarily guilty of a breach of statutory duty because a servant employed by him commits such a breach in the course of his employment, but there are cases where the servant's breach may be imputed to the master. A statute may be so framed as to make the master vicariously responsible. Moreover, the servant may be the agent to whom the performance of the duty is delegated, and then his acts will be treated as the acts of the master. If the employer entrusts the performance of the duty to another, he will be liable for non-performance by that other unless there is something in the statute to exonerate him (h). It is sometimes impossible or even illegal for the employer himself to carry out without delegation the duty imposed upon him by statute, but he is liable for a breach of his duty if those to whom he has entrusted the performance have failed to comply with the statutory requirements (i).

There is no decision of the Courts which determines whether common employment is a good defence when the cause of action is based on the breach of an absolute duty at common law. In *Knott v. L. C. C.* (k) Lord Wright said it might well be that the defence of common employment had no place in an action for breach of the absolute duty to keep safe a dangerous animal, and the same learned Judge said in *Wilsons and Clyde Coal Co. v. English* (l) that whether

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(e) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146; [1910] A. C. 74; *Bulter v. Fife Coal Co.*, [1912] A. C. 149; *Watkins v. Naval Colliery Co.*, [1912] A. C. 698; *Lochgelly Iron and Coal Co. v. M'Mullan*, [1934] A. C. 1; *Riddell v. Reid*, [1943] A. C. p. 24. *Vide infra*, s. 186. And this is so notwithstanding the apparently clear words of s. 29 (1) of the Workmen's Compensation Act, 1925.

(f) A general duty to all the world differs from a duty laid upon the employer towards his employees: *The Napier Star*, [1939] P. p. 340.

(g) [1898] 2 Q. B. 402.

(h) *Yelland v. Powell Duffryn Collieries*, [1941] 1 K. B. 154.

(i) *S.C.* pp. 166-7.

(k) [1934] 1 K. B. pp. 139-40. See also *Winfield*, p. 156; *Williams, Animals*, pp. 333-4.

(l) [1938] A. C. pp. 88-4, cp. p. 78. Cp. *Bain v. Fife Coal Co.*, [1935] S. C. p. 693. See, however, *Goddard, L.J.*, in *Speed v. Thomas Swift*, [1943] K. B. p. 571.

the duty is statutory or common law, if it is the employer's personal duty, even if he only performs it or can only perform it by servants or agents, a failure to perform it is the employer's personal negligence. This in effect covers most cases in which the question is likely to arise.

9. *Criticisms of the rule.*—The doctrine of common employment has been subjected to much criticism. Lord Atkin has said (*m*) that at the present time "it is looked at askance by Judges and text-book writers. 'There are none to praise and very few to love'. But it is too well established to be overthrown by judicial decision". Lord Macmillan regards it as "one of the ironies of the law" that it should have been in appeals from Scotland that the House of Lords had fastened upon the law of Scotland "a principle as distasteful as it was alien to Scottish jurisprudence" (*n*). But its provenance has been differently ascribed (*nn*). Lord Wright has declared (*o*) that the principle upon which this "illogical" doctrine is based "is stated with little regard to reality or to modern ideas of economics or industrial conditions", and has described it (*p*) as "an arbitrary departure from the rules of the common law based on a prejudiced and one-sided notion of what was called public policy". Perhaps the most bitter condemnation of all comes from MacKinnon, L.J., who damned it as "a doctrine which lawyers who are gentlemen have long disliked", and expressed the hope that, though its unfairness had been mitigated by many modern cases, his successors in the Court of Appeal would some day be able to hail with relief a short Act of Parliament abolishing the doctrine altogether (*q*). In fact several Bills have been introduced with a view to abolishing the doctrine, but the Government has resisted them on the ground that the question is intimately bound up with the modification of the system of workmen's compensation, which has been referred to a Royal Commission (*r*).

On the other hand the doctrine is not without its supporters.

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(*m*) In *Radcliffe's Case*, [1939] A. C. p. 223.

(*n*) *S.C.* p. 235.

(*nn*) *Supra*, s. 28 (1).

(*o*) In *Wilson's Case*, [1938] A. C. pp. 79—80.

(*p*) In *Radcliffe's Case*, [1939] A. C. p. 245.

(*q*) In *Speed v. Thomas Swift*, [1943] K. B. p. 569. He was merely repeating the hopes expressed by Sir John Salmond (2nd ed., p. 93) about this "irrational" doctrine. Recent academic attacks upon the doctrine have been delivered by W. A. Robson and J. Gold (1 Mod. L. R. 221), J. Unger (2 Mod. L. R. 43) and Friedmann (7 Mod. L. R. p. 79), who in his *Legal Theory*, pp. 266-7, 337, 339-40, has pointed out the judicial restrictions put upon the doctrine.

(*r*) 187 L. T. Jo. 175. Bills were introduced in 1884 (177 L. T. Jo. 97) and 1936 (181 L. T. Jo. 268).

So it has been said to be “logical and intelligent” (s), required by commercial necessity (t), and neither arbitrary nor dictated by class interest (u). In considering the proposed abolition of the rule it seems important to bear in mind four points as the law stands to-day: (1) The negligent fellow-servant is always liable; (2) the master is liable if he has been personally negligent as interpreted above (w); (3) in the great majority of cases where the doctrine applies a remedy is given under the Workmen’s Compensation Acts; (4) the Courts have recently shown a strong tendency not to imply the term in the contract of employment unless it can be implied with some show of reason (x). Were the doctrine abolished a spate of “gold-digging” actions would flood the Courts in which plaintiffs would endeavour to obtain from a compassionate jury higher damages than those to be obtained under the Acts. It may well be that instead of abolishing the doctrine of common employment the requirements of social justice and expediency would be more wisely met by an extension of the machinery for determining compensation provided by the Workmen’s Compensation Acts—which might be on a more generous scale—to all forms of employment and by enacting that the doctrine of common employment should not apply in cases where there is no contract of service falling under the Acts, e.g., in the case of volunteers.

### § 29. The Employers’ Liability Act, 1880

1. *Statutory exceptions to rule of common employment.*—The Employers’ Liability Act of 1880 made the first statutory inroad upon the common law rule of common employment. Under it railway servants and persons engaged in manual labour other than domestic or menial servants were enabled in a limited number of strictly defined cases and subject to various strict conditions to recover in the county court a sum not to exceed the estimated earnings of the servant during the three years preceding the injury for personal injuries caused by the negligence of their fellow-servants.

2. *Defences under the Act.*—But in no case under the Act has a

(s) Chapman in 2 Mod. L. R. 291, 295.

(t) Bohlen, Studies, p. 463; Harvard Essays, p. 514.

(u) Pound, Interpretations, pp. 109–11, and in 53 H. L. R. pp. 373–82. Cp. Burdick, 25 H. L. R. 349; Torts, ss. 171, 172.

(w) *Supra*, s. 28 (7) (8).

(x) See cases cited in notes to s. 28 (2), *supra*, and *Lambert v. Constable* (1940), 163 L. T. 194, and *Yelland v. Powell Duffryn Collieries*, [1941] 1 K. B. 154.

servant a cause of action if any of the following circumstances exist:—

- (a) If he knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the defect or negligence (*s. 2 (8)*).
- (b) If he has been guilty of contributory negligence, there being nothing in the Act to exclude this common-law defence (*y*).
- (c) If he has expressly or impliedly agreed to take the risk upon himself. A servant may expressly contract himself out of the Act (*yy*), and he may also do so impliedly by undertaking or continuing the work with full knowledge of the danger incurred by him, under circumstances which prove as a matter of fact that he impliedly agreed to take this risk upon himself. In this case the doctrine of *Volenti non fit injuria* is applicable (*z*).

3. *Concurrent liability at common law.*—There may be concurrent liability both under the Act and at common law: as, for example, when the master has been guilty of personal negligence, or where there is no common employment; and in these cases the common-law remedy exists to its full extent, and is not cut down by the conditions and limitations of the statutory remedy. But both remedies cannot be pursued: they are alternative (*zz*).

4. *Liability when servant killed.*—When the servant is killed instead of being merely injured, the right of his relatives and representatives is based both upon the Employers' Liability Act and upon the Fatal Accidents Act (*a*). At common law there was a double defence for the master in such a case: first, the rule that the death of a person is not a cause of action (now excluded by the Fatal Accidents Act), and secondly, the rule of common employment (now excluded by the Employers' Liability Act). The claim in such a case, therefore, must conform to the requirements of both of these Acts.

5. Since the passing of the Workmen's Compensation Acts pro-

(*y*) *Weblin v. Ballard* (1886), 17 Q. B. D. 122.

(*yy*) *Griffiths v. Earl of Dudley* (1882), 9 Q. B. D. 357, a case which was, however, doubted by Lord Wright in *Admiralty Commissioners v. Valverde (Owners)*, [1938] A. C. p. 185.

(*z*) *Supra*, s. 8 (3) (6); *Smith v. Baker*, [1891] A. C. 325.

(*zz*) *Hills v. Co-operative Wholesale Society*, [1940] 2 K. B. 74.

(*a*) *Infra*, s. 92.

ceedings are less frequently taken under the Employers' Liability Act and it therefore seems unnecessary to give further details here (b).

### § 30. The Workmen's Compensation Act, 1925

1. By this Act (c) employers are, in the cases to which it extends, the insurers of their servants against accidental injuries and death. The obligation of compensation is independent of any negligence on the part of employers or fellow-servants, and in strictness it stands outside the law of torts altogether. It is a statutory term of the contract of service. The liability thus created may be concurrent with delictual liability either at common law or under the Employers' Liability Act, and in such cases the servant may elect between the various remedies available for him (d).

2. *Workmen*.—The Workmen's Compensation Acts have given rise to a large literature of their own, and there are two series of law reports entirely devoted to decisions under the Acts. It is impossible here to give more than the briefest account of the provisions of the Act of 1925, but the matter is of such great practical importance that it seems desirable to do that as the Act is relevant to, though not strictly within, the Law of Tort. Workmen under the Act are all those who work under a contract of service, whether by way of manual labour, clerical work or otherwise, and those who ply for hire with a vehicle under a contract of bailment, except—

- (a) persons employed otherwise than by way of manual labour whose remuneration exceeds £420 a year;
- (b) persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business, not being employed for the purposes of any game or recreation and engaged or paid through a club;
- (c) members of the police force;
- (d) outworkers;
- (e) members of the employer's family dwelling in his house (s. 8) (dd);

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(b) For a fuller treatment, see 7th ed., s. 31.

(c) The first Workmen's Compensation Act was in 1897, and the first comprehensive Act was that of 1906. The Act of 1925 is a consolidating Act.

(d) Workmen's Compensation Act, 1925, ss. 29, 30. See *Lochgelly Iron and Coal Co. v. M'Mullan*, [1934] A. C. 1. See also *Perkins v. Hugh Stevenson*, [1940] 1 K. B. 56; *Stimpson v. Standard Telephones*, [1940] 1 K. B. 342; *Coe v. L. & N. E. Ry.*, [1943] K. B. 531; *Young v. Bristol Aeroplane Co.*, [1944] K. B. 718.

(dd) As amended by the National Health Insurance, Contributory Pensions and Workmen's Compensation Act, 1941, s. 13.

- (f) persons in the naval or military or air service of the Crown (s. 38).

3. *Liability to and amount of compensation.*—Under the Act the employer must pay compensation if “in any employment personal injury by accident arising out of and in the course of the employment” is caused to a workman (s. 1). Where death results from the injury the compensation is payable to or for the benefit of the dependants (s. 2). The liability to and the amount of the compensation is determined by arbitration in the county court according to elaborate rules (ss. 8—18) (*ddd*). The maximum sum payable is £600 (*e*). The employer is liable to pay compensation though neither he nor those for whom he is responsible have been guilty of negligence. Nor is contributory negligence a defence. But “if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed” (s. 1 (1)). Common employment is no defence. The employer is not liable in respect of any injury which does not disable the workman for a period of at least three days from earning full wages.

4. *No contracting out.*—Employers and workmen coming under the Act cannot contract out of it, except where the provisions of a scheme certified by the Registrar of Friendly Societies as not less favourable to the workman are substituted for the provisions of the Act (ss. 1 (8) and 31).

5. *Limitations.*—In order that compensation may be obtained notice of the happening of the accident must be given as soon as practicable, and the claim for compensation must be made within six months from the occurrence of the accident, or in case of death within six months from the time of death, unless the failure to make the claim was occasioned by mistake, absence from the United Kingdom or other reasonable cause (s. 14).

### § 31. Employers of Independent Contractors

1. *Exceptions to rule that in general employers of independent contractors are not responsible for them.*—As already indicated (*ee*),

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(*ddd*) As amended by the Workmen's Compensation Act, 1943.

(*e*) At present £700: W. C. (Temporary Increases) Act, 1943, s. 2 (2).

(*ee*) *Supra*, s. 26 (3).



the general rule is that although an employer is responsible for the negligence and other wrongdoing of his servant, he is not responsible for that of an agent who is not a servant but an independent contractor. There are, however, certain cases in which an employer is liable for the acts of an independent contractor. And the tendency of legal development is in the direction of extending rather than restricting this liability (f). Such liability is not properly vicarious (g): the employer is not liable for the contractor's breach of duty; he is liable because he has himself broken his duty. "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor" (h). It is analogous to "statutory negligence" (i). "An employer may be 'personally' negligent in respect of the acts and omissions of himself; but he may also . . . be described as personally negligent in respect of breach of a duty imposed on him by law and of such a character that he is debarred from avoiding responsibility by delegating its performance" (k).

2. *Contractors employed to do illegal acts.*—In the first place, the employer of an independent contractor is liable for any wrongful act authorised by the employer, and such authority may be either precedent or by way of subsequent ratification (l).

3. *Contractors negligently employed.*—In the second place a person is none the less liable for his own negligence because the direct cause of the damage done may be the negligence of an independent contractor employed by him. If, therefore, I owe a duty of care I am not necessarily exempted from that duty by delegating the performance of it to an agent. The very act of such delegation may be itself an act of negligence—as when due care is

(f) *Honeywill & Stein, Ltd. v. Larkin Bros.*, [1934] 1 K. B. p. 197. Friedmann even goes so far as to say (1 Mod. L. R. p. 54), "the traditional distinction between an employer's liability for the acts of his servants and for those of his independent contractors has no longer any real meaning." This, it will be seen, is probably an over-statement. Cp. 59 L. Q. R. p. 69.

(g) Cp. Hilbery, J., in *Daniel v. Rickett, Cockerell & Co.*, [1938] 2 K. B. p. 325.

(h) *Dalton v. Angus* (1881), 6 App. Cas., p. 829, per Lord Blackburn. Lord Blackburn's statement must be limited to those cases in which the employer is under a duty of strict liability.

(i) *Infra*, s. 136.

(k) *Lockgelly Iron and Coal Co. v. M'Mullan*, [1934] A. C. pp. 21-2, per Lord Wright. Cp. *supra*, s. 28 (7), *infra*, s. 136. c

(l) *Supra*, s. 24.

not taken to see that the agent is properly qualified for the performance of the task so committed to him, or where proper instructions are not given to him in order to enable him to avoid the dangers incidental to the work. Thus, in *Robinson v. Beaconsfield Rural Council* (m) the defendants, being under a duty to remove sewage from premises within their district, and having employed an independent contractor to do this work, were held responsible for the injurious act of that contractor in depositing the sewage by way of trespass on the plaintiff's property, since they had not made it a term of the contract that the contractor should dispose of the sewage.

4. *Contractors employed to do lawful acts which the employer would himself do at his own risk.*—In the third place, if an employer is under a duty to a person or class of persons, he is liable if that duty is not performed and damage thereby results, and cannot evade that liability by delegating the performance of the duty to an independent contractor (n). Whether there is such a duty will depend upon whether the employer as a reasonable man ought to foresee that the persons who suffer damage are likely to be affected by the performance of the independent contractor's acts (o). The law has imposed such a duty in the following classes of case:—

(a) *Cases of absolute liability.*—Where the act which the contractor is employed to do is one of the kind which the employer does at his own peril, in other words, where the act is one to which a rule of absolute liability applies—so that the existence of negligence is immaterial—it is no defence that the cause of the mischief was the negligence of an independent contractor by whose agency the act was done. Thus where the owner of a factory is under an absolute statutory duty to supply certain safeguards for his workmen—e.g., to guard dangerous machinery—he is equally liable whether the failure to perform this duty is the act of himself or his servants or is the act of an independent contractor to whom the duty was delegated by him (p). On the same principle a person from whose land a destructive fire spreads to the land of his neighbour cannot defend himself by the plea that the direct cause of the

(m) [1911] 2 Ch. 188.

(n) See the valuable article by Stephen Chapman in 50 L. Q. R. 71. Cp. *Flower v. Prechtel* (1934), 150 L. T. 491.

(o) Friedmann denies this: 1 Mod. L. R. p. 55.

(p) See *Groves v. Wimborne*, [1898] 2 Q. B. 402.

mischief was the negligence of his agents (q). So also the employer is liable where an independent contractor interferes with support accorded to land or buildings (r).

(b) *Cr. ation of dangers in a highway*.—Such a duty is imposed where a person employs a contractor to do in a highway some dangerous act other than the ordinary use of the highway for the purposes of passage or traffic, or where a person, having done such an act in a highway, delegates to a contractor the work of taking the precautions necessary to avoid mischievous consequences. Such employment or delegation is permissible only on the terms of warranting the public against the negligence of the agent so intrusted with the work. Thus in *Gray v. Pullen* (s), the defendant, being the owner of a house adjoining the highway, lawfully employed a contractor to cut a trench in the road and to lay therein a drain connecting the house with the sewer. The contractor negligently and imperfectly filled in the trench, which subsided, and the defendant, though guilty of no negligence, was held liable to the plaintiff, a passenger in the highway, who suffered personal injuries by reason of this obstruction (t).

*Ordinary use of highway outside rule*.—This rule of vicarious liability does not extend to dangers incidental to the ordinary use of a highway for purposes of traffic. He who creates or authorises a danger of this kind does not do so at his peril, but will answer

(q) *Black v. Christchurch Finance Co.*, [1894] A. C. 48.

(r) *Bower v. Peate* (1876), 1 Q. B. D. 321; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Blake v. Woolf*, [1898] 2 Q. B. p. 429, *per* Wright, J.; *Hughes v. Percival* (1883), 8 App. Cas. 443; *Lemaitre v. Davis* (1881), 19 Ch. D. 281.

(s) (1864), 5 B. & S. 970.

(t) *Cp. Penny v. Wimbledon U. D. C.*, [1899] 2 Q. B. 72 (heap of soil negligently left on highway unlighted and unprotected); *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392 (servant of a plumber, an independent contractor, dipping a benzoline lamp into a cauldron of molten solder and causing explosion in public street); *Tarry v. Ashton* (1876), 1 Q. B. D. 314 (failure of contractor to repair lamp suspended over street). Other applications of the same principle are: *Hardaker v. Idle D. C.*, [1896] 1 Q. B. 335 (failure to support gas-pipe in making sewer under highway), on which see Salmond's note (6th ed.), s. 67 (2), n. (m); *Hole v. Sittingbourne Ry.* (1861), 6 H. & N. 488 (defective bridge erected so as to obstruct canal); *The Snark*, [1900] P. 105 (wreck in navigable river insufficiently lighted by the negligence of an independent contractor). With this case contrast *The Jersey*, [1942] P. 119. The case of *Pickard v. Smith* (1861), 10 C. B. (N.S.) 470, in which the occupier of refreshment rooms in a railway station was held liable for the negligence of a coal merchant who, in delivering coals to the defendant, left unlashed a coal-plate upon the adjoining platform, is apparently to be taken as deciding that the same rule as to vicarious liability for dangers to a highway or navigable river extends to all places in which there is a public right of access or entry.

only for his own personal negligence and for that of his servants. If I engage a cab, the cabman is not my servant, and I am not responsible to persons who may be run down by his negligent driving (*u*). So if I employ a carrier to carry goods for me through the streets, I am not responsible for the carelessness with which he does it (*w*).

(c) *Acts done under statutory authority*.—It is sometimes said that where a person is employed to do an act which would be unlawful but for statutory authority the employer will be liable (*x*), but the cases in which this rule has been relied upon are also highway cases, and it is doubtful whether the rule has any independent existence (*y*).

(d) *Extra-hazardous acts*.—Again, in the case of “extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others”, an obligation is imposed upon the ultimate employers to take special precautions which they cannot delegate by having the work carried out by independent contractors (*z*). Thus, in *Honeywill & Stein, Ltd. v. Larkin Bros.* (*a*) it was held that the plaintiffs who employed the defendants to take flash-light photographs in a cinema were liable to the owners of the cinema for a fire caused by the defendants in carrying out the work (*b*). “Where the introduction of implements or substances dangerous in themselves, such as flame-bearing instruments or explosives, are [*sic*] necessarily incidental to the work to be performed, a [sub-]contractor is bound by an unescapable

(*u*) *Quarman v. Burnett* (1840), 6 M. & W. 499.

(*w*) See *Wilson v. Hodgson's Kingston Brewery Co.* (1916), 85 L. J. K. B. 270; *Phillips v. Britannia Laundry Co.*, [1923] 1 K. B. 539; [1923] 2 K. B. 832 (motor car in dangerous condition). Cp. *Pinn v. Rew* (1916), 32 T. L. R. 451.

(*x*) E.g., *Holliday v. National Telephone Co.*, [1899] 2 Q. B. p. 398, *per* Lord Halsbury; *Hardaker v. Idle District Council*, [1896] 1 Q. B. p. 351, *per* Rigby, L.J.

(*y*) See *Chapman* in 50 L. Q. R. p. 78.

(*z*) *Honeywill & Stein, Ltd. v. Larkin Bros.*, [1934] 1 K. B. p. 197. Cp. *Bower v. Peate* (1876), 1 Q. B. D. p. 326, *per* Cockburn, C.J., whose proposition Lord Blackburn in *Hughes v. Percival* (1883), 8 App. Cas. pp. 446-7, thought too wide. But see also *Brooke v. Bool*, [1928] 2 K. B. p. 587. Pollock (45 L. Q. R. 1) regarded the above as “the best reason of all” for the decision in that case.

(*a*) [1934] 1 K. B. 191. But see *Read v. Lyons* (1914), 61 T. L. R. 156.

(*b*) Winfield has canonised *Brooke v. Bool* and *Honeywill & Stein, Ltd. v. Larkin* by treating them as creating a new tort, and devotes in his Textbook a separate chapter to “Dangerous Operations”. Goodhart has, however, shown that Slessor, L.J., who delivered the judgment of the Court of Appeal in the latter case, can have had no intention of creating a new tort: 2 Mod. L. R. pp. 9-10.

duty. . . . He has not merely a duty to take care but a duty to provide that care is taken " (c) (d).

(e) *Nuisance*.—In *Matania v. National Provincial Bank* (e) where extensive building operations were being undertaken which caused a great and obvious danger that a nuisance would be caused by dust and noise, the principle of *Honeywill & Stein, Ltd. v. Larkin Bros.* was applied to an action for nuisance. "If the act", said Slessor, L.J. (f), "is one which in its very nature involves a special danger of nuisance being complained of then it is one . . . for which the employer of the contractor will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise." It has been suggested (g) that this rule will cover the case of any nuisance caused by an independent contractor and incidental to the work which he is instructed to do. But this, it is submitted, is not the case. *Matania's Case* was specifically stated to be "not a case of mere ordinary building operation" (h).

(f) *Duty to invitees*.—An occupier is probably not liable under the rule in *Indermaur v. Dames* for the default of an independent contractor as regards the structure of the premises, but if he delegates the duty of keeping the premises safe (other than by structural repair), e.g., by removing snow, he will be liable for failure to perform the duty if no technical knowledge is required for its due performance (k).

5. *Collateral negligence*.—The employer is never, however, liable for the collateral or casual negligence of an independent contractor.

(c) *The Pass of Ballater*, [1942] P. p. 117, per Langton, J. Cp. *Atkin, L.J.*, in *Belvedere Fish Guano Co. v. Rainham Chemical Works*, [1920] 2 K. B. pp. 504–5. Contra Lords Buckmaster and Parmoor in *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. pp. 477, 491. To arrange for a journey by aeroplane was not even in 1937 to set in motion a thing dangerous in itself: *Fosbrooke-Hobbes v. Airwork, Ltd.*, [1937] 1 A. E. R. 103.

(d) Salmond objected to this principle (8th ed.), pp. 124–5, but his objection was based on his general objection to liability without fault. If the work requires special technical skill, which the employer himself cannot be expected to possess, it is obvious that nothing could be more reckless than for him to attempt to do the work himself or to supervise the work of the contractor. It is clearly a case of liability without fault. The vitality of the doctrine shows that it meets a need, and it seems not unreasonable to impose a special liability upon those who enter upon extra-hazardous undertakings. Such a liability is frequently imposed where there is a contractual basis for the duty, e.g., *Francis v. Cockrell* (1870), L. R. 5 Q. B. 501, *infra*, s. 128. See Bohlen, *Studies*, pp. 432–36; E. R. Thayer in 29 H. L. R. pp. 808–11, *Harvard Essays*, pp. 606–9.

(e) (1936), 155 L. T. 74.

(f) At p. 646. Cp. *Cockburn, C.J.*, in *Bower v. Peate* (1876), 1 Q. B. D. at p. 326.

(g) By *Friedmann*, 59 L. Q. R. 70; cp. 1 *Mod. L. R.* pp. 54–5.

(h) At p. 651.

(k) *Vide infra*, s. 129 (2).

"Accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand and do not come within this rule" (l). Thus in *Padbury v. Holliday & Greenwood, Ltd.* (m), where one of the contractors' workmen placed a tool on a window-sill, not in the ordinary course of the work which the contractors were employed to do, and the casement having been blown to by the wind the tool fell and injured the plaintiff, it was held that this was collateral negligence, and the ultimate employers were held not liable. It is by no means always easy to decide whether the negligent act in a particular case is collateral or not (n). In *Holliday v. National Telephone Co.* (o) (where owing to the negligence of a plumber employed as an independent contractor to do work in a public street molten solder was scattered by the explosion of a benzoline lamp) judgment was given for the defendant in the Court below on the express ground that the negligence of the plumber was merely collateral. "The act", said Wills, J. (p), "is about as typical an instance of negligence merely casual, collateral or incidental, as can well be conceived." Nevertheless, the Court of Appeal disagreed with this view of the case and gave judgment for the plaintiff. Probably the rule as to collateral negligence means nothing more than that the negligence required to impose liability upon the employer of an independent contractor must be negligence committed in the doing of the act itself which he is employed to do, and that negligence in other operations which, though connected with that work, are not themselves part of the work which he has contracted to do, is not sufficient. Thus if the defendant employs a contractor to make an excavation in a street, the defendant will be responsible for the negligence of the contractor in failing to light or guard the excavation, but will not be responsible for his negligence in carting materials to or from the scene of the operations. The latter work is equally within the scope of the contractor's employment, and if the person so employed was a servant, his employer would be responsible (q), whereas it is other-

(l) *Romer, L.J.*, in *Penny v. Wimbledon U. D. C.*, [1899] 2 Q. B. p. 78. This dictum was, however, doubted by *Joyce, J.*, in *Robinson v. Beaconsfield R. D. C.*, [1911] 2 Ch. p. 192.

(m) (1912), 28 T. L. R. 494.

(n) See *Chapman* in 50 L. Q. R. pp. 78—81.

(o) [1899] 1 Q. B. 221.

(p) *Ibid.* p. 228. It is difficult to reconcile this case with *Reedie v. L. & N. W. Ry.* (1849), 4 Ex. 244. See the comments of *Pollock* in 80 R. R., Preface, p. vi.

(q) Cp. *Lord Blackburn* in *Dalton v. Angus* (1881), 6 App. Cas. p. 829. *Vide supra*, s. 27 (1). The doctrine of collateral negligence finds no place in the law of master and servant.

wise with an independent contractor (r) (s). For such work is outside the principle of the rule which is that certain things are dangerous and therefore can only be done at the employer's risk. If the accident is caused by something which has no connection with the special risk the employer is not liable.

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(r) But see Friedmann in 1 Mod. L. R. p. 55.

(s) See further as to collateral negligence, *Hole v. Sittingbourne Ry.* (1861), 6 H. & N. at p. 497; *Dalton v. Angus* (1861), 6 App. Cas. at p. 829; *Hardaker v. Idle District Council*, [1896] 1 Q. B. at p. 840; *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. at p. 76. The American Restatement (s. 426) defines collateral negligence as: "The negligence of a contractor in the course of performing work entrusted to him by his employer, which does not make the result fall short of that which it would be the employer's duty to attain, had he done the work himself."

## CHAPTER IV

## JUDICIAL REMEDIES

## § 32. Classes of Remedies for Torts

1. *Remedies judicial and extra-judicial.*—Remedies for torts are of two kinds, being either judicial or extra-judicial—remedies by way of an action at law, and remedies by way of self-help. The various forms of extra-judicial remedy, such as distress, the retaking of property, and the abatement of a nuisance, will be considered in the next chapter, and we are here concerned with the other class alone.

2. *Damages.*—The remedies obtainable for a tort by means of an action at law are of three chief kinds—(1) damages, (2) injunction, and (3) specific restitution of property. The first of these is the ordinary and characteristic remedy.

3. *Injunction.*—An injunction is the order of a Court of justice directing the defendant to abstain from the commission, continuance, or repetition of an unlawful act, or to do some act which he is legally bound to do—such an order being enforced by imprisonment (by way of attachment or committal for contempt) in case of disobedience. Injunction is a remedy against present or impending injury; damages are a remedy for an injury already suffered.

4. *Specific restitution.*—The third form of judicial remedy is the specific restitution of property. He who is wrongfully dispossessed of his land, for example, is entitled to recover, not the value of the land as damages, but the land itself; and a judgment in his favour will be executed by force if need be. So in the case of chattels wrongfully taken or detained the owner has the option of claiming either their value as damages, or specific restitution of possession (a). This remedy of specific restitution is obviously very similar to that of injunction, but differs from it in two ways—(a) in its historical origin, injunction being a purely equitable remedy, available originally only in the Court of Chancery, while specific restitution was a remedy granted by the Courts of common law;

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(a) As to specific recovery of land, see Chapter VII; and as to the specific recovery of chattels, see s. 82, *infra*.



(b) in its mode of execution, injunction being enforced by imprisonment for disobedience, while specific restitution is enforced by the forcible seizure of the property and its restoration to the plaintiff.

### § 33. Damages

1. *Nominal and substantial damages.*—The damages recoverable for a tort are either nominal or real. Nominal damages are a small sum of money—for example, a shilling—awarded not by way of compensation for any actual loss suffered, but merely by way of recognition of the existence of some legal right vested in the plaintiff and violated by the defendant (*aa*). Real damages, on the other hand, are those which are assessed and awarded as compensation for damage actually suffered by the plaintiff, and not simply by way of mere recognition of a legal right violated—*injuria sine damno*.

Damages are not nominal merely because they are very small. If actual damage, however small, is proved, and damages, however small, are awarded in respect of it, such damages are real and not nominal. They represent *damnum*, and not merely *injuria*.

It follows accordingly that nominal damages are recoverable only in the case of torts which are actionable *per se*. If a right is violated the law presumes damage (*b*) and an action will lie even though no damage at all has been suffered by the plaintiff. This is the case where the defendant's act is necessarily a legal injury to the plaintiff, as in all types of trespass, whether to land, goods or the person and in some actions on the case, as in libel and in certain cases of slander (*bb*). So also in *Ashby v. White* (*c*), Lord Holt, C.J., held that an elector had a right of action against a returning officer who wrongfully and maliciously rejected his vote at an election even though the candidate for whom he intended to vote was elected. So again in *Constantine v. Imperial London Hotels* (*cc*) the plaintiff, the famous West Indian cricketer, was held entitled to nominal damages because the defendants wrongfully refused to receive him

(*aa*) See *The Mediana*, [1900] A. C. p. 116.

(*b*) *Embrey v. Owen* (1861), 6 Ex. p. 368, *per* Parke, B. *Supra*, s. 4 (5).

(*bb*) For an example of the award of nominal damages, see *Hiorf v. L. & N. W. Ry.* (1879), 4 Ex. D. 188. *Cp. Puroshottam das Kapur v. Trentham*, [1939] 1 K. B. 253. Before 1929 if a jury awarded nominal damages contemptuously in an action of defamation it might be a "good cause" under Ord. LXV, r. 1, for the Judge in the exercise of his discretion to deprive the plaintiff of his costs. *Martin v. Benson*, [1927] 1 K. B. 771. This is no longer so: see S. R. & O., 1929, No. 1116.

(*c*) (1703), 2 Ld. Raym. 938.

(*cc*) [1944] K. B. 693.

into one of their hotels to which he wished to go, though they provided him with lodgings in another of their hotels. Similarly, where, as in cases of private nuisance, the continuance of the defendant's interference with the plaintiff's right would eventually give him a prescriptive right to commit the nuisance with impunity, the plaintiff may recover nominal damages, even though in fact he has suffered no actual damage from the defendant's conduct (*d*). Again, as we shall see (*dd*), a reversioner may sue to prevent the creation of a prescriptive right against him, although, being out of possession, he has suffered no actual *damnum*. For all such injuries nominal damages at the least are always recoverable, even though no damage at all has been suffered by the plaintiff.

But in many cases the plaintiff's only right is not to be caused damage by the defendant, and in such a case he must prove actual damage. Damage then is the gist of the action. Thus, for example, damage must be proved in an action of negligence. So also in an action for the withdrawal of lateral support (*e*), and indeed in the great majority of actions on the case.

2. *The measure of damages.*—Where the damages are real it becomes necessary to determine what is the measure of damages in each case. "By the measure of damages is meant the standard or method of calculation by which the amount of damages is to be assessed" (*ee*). "The common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. If there be any special damage which is attributable to the wrongful act, that special damage must be averred and proved . . . If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question. For a jury question no rigid rules, or rules that apply to all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which . . . it is the duty of the Judge in the case to bring before the jury" (*f*). If there is no jury, the Judge or other assessor must act on the principles upon which a Judge would direct a jury to act.

(*d*) *Embrey v. Owen* (1851), 6 Ex. 353; *Bower v. Hill* (1835), 1 Bing. N. C. 549.

(*dd*) *Infra*, s. 84 (4).

(*e*) *Infra*, s. 60 (9).

(*ee*) Halsbury, x. 119.

(*f*) *Admiralty Commissioners v. S.S. Susquehanna*, [1926] A. C. pp. 661-2, *per* Lord Dunedin.

The relevant considerations arising under particular torts will be dealt with, where necessary, in considering those torts.

*General and special damages.*—Damages are distinguishable as being either general or special. General damages are compensation for general damage; special damages for special damage. This distinction relates to the law of pleading and procedure, rather than to the substantive law. General damage is that kind of damage which the law presumes to follow from the wrong complained of, and which, therefore, need not be expressly set out in the plaintiff's pleadings. Special damage, on the other hand, is damage of such a kind that it will not be presumed by the law, and must therefore be expressly alleged in those pleadings, so that the defendant may have due notice of the nature of the claim—otherwise the plaintiff will not be permitted to give evidence of it, nor will the jury be at liberty to award compensation in respect of it. Thus, in an action for false imprisonment, general damages are recoverable in respect of the inconvenience, indignity, and discomfort so suffered by the plaintiff, for these are the natural and normal results which the law presumes to follow from any injury of this description. But if the plaintiff has by his imprisonment incurred medical expenses or has suffered any specific pecuniary loss such as loss of wages (ff), this is special damage which must be expressly alleged and proved, otherwise compensation cannot be recovered in respect of it. So in the case of a collision between two ships or motor cars due to the negligence of the defendant, the plaintiff will be able to recover general damages for the loss of the use of his ship during the repairs even if it be not used for trading for profit, or for the loss of the use of his motor car even though it be used only for pleasure purposes (g). Nor will it avail the defendant to prove that even apart from the collision the plaintiff would not have in fact made use of the damaged vehicle. "What right", asked Lord Halsbury, L.C., in *The Mediana* (h), "has a wrongdoer to consider what use you are going to make of your vessel? . . . Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?" But if the ship be used for earning freight,

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(ff) *Cp. Liffen v. Watson*, [1940] 1 K. B. 556.

(g) *Admiralty Commissioners v. S.S. Susquehanna*, [1926] A. C. 655; *Admiralty Commissioners v. S.S. Chekiang*, [1926] A. C. 637.

(h) [1900] A. C. p. 117. *Cp. The London Corporation*, [1935] P. 70; *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. pp. 192, 208.

then the shipowner may claim as special damage the amount of freight which, but for the accident, the ship would have earned during the period of detention (i) (k). In such a case the defendant may show to negative the claim that independently of the accident in question the ship could not have been used by the plaintiff (l). Further, the damages for which the defendant is liable cannot be increased by reason of the want of funds of the plaintiff (m).

3. *Compensatory and exemplary damages.*—Damages are further distinguishable as being either compensatory or exemplary. The latter are also known as vindictive or punitive. Compensatory damages are awarded as compensation for, and are measured by, the material loss suffered by the plaintiff (n). Exemplary damages, on the other hand, are a sum of money awarded in excess of any material loss and by way of *solatium* for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of. Thus, an assault may do no physical harm whatever; it may amount, for example, to a mere threat of violence; yet if it is committed in such a manner or in such circumstances as to be a grave attack upon the dignity of the plaintiff, he may recover very substantial damages for it. So in an action by a father for the seduction of his daughter, the only actual loss which gives him a right of action is the loss of his daughter's services; yet damages are not limited to the amount of this loss, but are awarded in respect of the injury to his parental feelings and personal dignity. Exemplary damages, therefore, are given only in cases of contumelious disregard of another's rights. They may be given even in cases of trespass to

(i) *Admiralty Commissioners v. S.S. Valeria*, [1922] 2 A. C. 242; *Davis v. Oswell* (1837), 7 C. & P. 804. Such damage must be proved: *Sunley & Co. v. Cunard White Star*, [1940] 1 K. B. 740.

(k) It is to be noted that the term "special damage" is also used in a different though closely related sense, as meaning such actual damage as must be proved to constitute a cause of action in the case of injuries not actionable *per se*. Thus it is said that slander is not actionable without proof of "special damage". As damage of this kind must be specially pleaded, it necessarily constitutes special damage in the other sense of the term also.

(l) *The Strathfillan v. The Ikala*, [1929] A. C. 196; *The York*, [1929] P. 178.

(m) *Liesbosch Dredger v. Edison*, [1933] A. C. 449. *Vide infra*, s. 34 (15).

(n) It is sometimes said, e.g., by Sir F. Jeune, P., in *The Kate*, [1899] P. p. 168, that "the general principle which governs the assessment of damages is . . . *restitutio in integrum*, qualified by the condition that the damage sought to be recovered must not be too remote". Cp. Lord Wright in *Liesbosch Dredger v. Edison*, [1933] A. C. p. 459. But Lord Dunedin pointed out in *Admiralty Commissioners v. S.S. Valeria*, [1922] 2 A. C. p. 248, that the phrase cannot strictly be applied to questions of tort. "If by somebody's fault I lose my leg and am paid damages, can any one in his senses say I have had *restitutio in integrum*?" Cp. *The Edison*, [1932] P. p. 67, *per Scrutton, L.J.* See also Jolowicz in *Cambridge Legal Essays*, pp. 203 sqq.

land or goods (o). "A malicious motive, an arrogant or insolent manner are things which justify exemplary damages being given by Judge or jury" (p). Exemplary damages may also be awarded in an action on the case (pp).

It is often said that exemplary damages (which are unknown in the Roman civil law and in Scotch law) are awarded not by way of compensation for the plaintiff, but by way of punishment for the defendant (q). Others, however, regard them as a *solatium* for wounded dignity and feelings: as a remedy for *injuria*, in the sense in which Roman lawyers used that term. So Lord Atkin said that damages for defamation are not "arrived at by determining the 'real' damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible . . . to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. . . . The 'punitive' element is not something which is or can be added to some known factor which is non-punitive" (r). Again, evidence is not admissible as to the means

(o) *Owen and Smith v. Reo Motors* (1934), 151 L. T. 274, Greer, L.J. *dubitante*. Cp. *Merest v. Harvey* (1814), 5 Taunt. 442; *Brewer v. Dew* (1843), 11 M. & W. 625.

(p) *Per Maugham, L.J.*, in *Owen and Smith v. Reo Motors* (1934), 151 L. T. p. 279. In *Walter v. Alltools, Ltd.* (1944), 171 L. T. 371 it was held that in an action of false imprisonment the damages may be aggravated by any evidence which tends to show that the defendant persevered in the charge which he originally made in bringing about the false imprisonment even though there is no evidence of malice, for a false imprisonment affects not only a man's liberty but his reputation.

(pp) *Emblen v. Myers* (1860), 6 H. & N. 54; *Bell v. Midland Ry.* (1861), 30 L. J. C. P. 273 (*per Willes, J.*). But in *Constantine v. Imperial London Hotels*, [1941] K. B. 693, *supra*, s. 33 (1), Birkett, J., refused the plaintiff exemplary or substantial damages, though finding that he had suffered much unjustifiable humiliation and distress because of the nature of the action. In a somewhat similar case of a carrier refusing to carry parcels which he was bound by law to take, *Crouch v. G. N. Ry.* (1856), 11 Ex. p. 759, Martin, B., said *obiter* that exemplary damages could be given.

(q) So *McCardie, J.*, in *Butterworth v. Butterworth*, [1920] P. pp. 136-7, approved a description given by the Supreme Court of New Jersey of exemplary damages as "a sort of hybrid between an assertion of ethical indignation and the imposition of a criminal fine" and said that they were "clearly punitive". Such damages include "a sum of money of a penal nature in addition to the compensatory damage given for either pecuniary or physical and mental suffering". In *Dumbell v. Roberts* (1944), 60 T. L. R. p. 233, speaking of damages for false imprisonment, Scott, L.J., said that "the damages are at large, and in so far as they represent the disapproval of the law . . . for improper interference with personal freedom they may be 'punitive' or 'exemplary' given by way of punishment of the defendant, or as a deterrent example, and they are not limited to compensation for the defendant's loss".

(r) *Per Lord Atkin in Ley v. Hamilton* (1935), 153 L. T. p. 386. Cp. *Rook v. Fairrie*, [1941] 1 K. B. p. 516, *per* Greene, M.R.

of the defendant for the purpose of increasing or diminishing the damages to be awarded (s) (t). On the other hand, Greene, M.R., is of the opinion that in such cases in addition to the injury which the plaintiff has suffered "you are considering the conduct of the defendant, . . . the deterrent effect and so forth" (tt). It seems that the punitive element in such damages cannot be entirely excluded, but to take it into account in the law of torts is an anomaly, for the principle underlying that branch of the law in general is compensation, not punishment. No distinction has been taken in the authorities between "aggravated" and "exemplary" damages. The former expression seems more apt for compensation where the damages are at large, the latter where the damages are awarded to mark the Court's disapproval of the defendant's conduct.

4. *Damages may include compensation for damnum sine injuria*.—It sometimes happens that damage which is in itself *damnum sine injuria* is caused by an act which, by reason of some other kind of damage also caused by it to the same person, is wrongful and actionable at the suit of that person. For example, a building which wrongfully obstructs the ancient lights of an adjoining building may at the same time obstruct other windows in that building which have not yet acquired legal protection. In such cases the damages recoverable for the wrongful act include compensation for the whole loss so caused, even though part of that loss is in itself *damnum sine injuria* (u). "If an actionable wrong has been done to the claimant, he is entitled to recover all the damage resulting from that wrong, and none the less because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable" (w). In other words, *damnum sine injuria*, although not itself a cause of action, may be a sufficient ground for damages in a claim based on

(s) *Keyse v. Keyse* (1886), 11 P. D. 100; *Hodgson v. Taylor* (1873), L. R. 9 Q. B. 79. It is, perhaps, partly for this reason that the jury should not be informed in a motor case whether the parties are insured: *Askew v. Grimmer* (1927), 43 T. L. R. 354. Cp. *Gowar v. Hales*, [1928] 1 K. B. 191; *Grinham v. Davies* (1928), 44 T. L. R. 523.

(t) Exemplary damages are not allowed in actions for breach of contract save in the exceptional case of breach of promise of marriage: *Addis v. Gramophone Co.*, [1909] A. C. 488.

(tt) *Rook v. Fairrie*, [1941] 1 K. B. p. 516.

(u) *Re London, Tilbury and Southend Ry.* (1889), 24 Q. B. D. 326; *Stroyan v. Knowles* (1861), 6 H. & N. 454.

(w) *Horton v. Colwyn Bay Urban Council*, [1908] 1 K. B. p. 341, *per* Buckley, L.J.

some other independent cause of action (x). This has been aptly called the "parasitic" element in damage (y).

### § 34. Remoteness of Damage (z) *39 sub Headings*

1. *Grounds on which damage may be held not recoverable.*—In a former chapter, under the head of *damnum sine injuria*, it has been pointed out in general terms that a person is not necessarily responsible in law for all the harm that he inflicts either wilfully, negligently or accidentally on other persons. A plaintiff who has suffered damage in consequence of the act of the defendant may be disentitled to recover compensation:

- (a) Because the defendant's act was not wrongful at all;
- (b) Because the plaintiff is not the person to whom the defendant owed the duty which he has violated;
- (c) Because the damage is not of a kind recognised by the law;
- (d) Because the damage has been caused in a manner which the law does not recognise as a sufficient ground of liability.

These four cases will be considered in their order.

2. *Damnum sine injuria.*—The first class of case calls for no special consideration. This is the case of *damnum sine injuria* in the strictest sense of that term. There is *damnum* suffered by the plaintiff, but no *injuria* committed by the defendant, either against the plaintiff or against any other person. Illustrations are damage done by way of competition in trade (a); or by negligent misrepresentation (b); or by the withdrawal of light or support from

(x) See also *Griffith v. Richard Clay & Sons, Ltd.*, [1912] 2 Ch. 291; *Jackson v. Watson & Sons*, [1909] 2 K. B. 193 (damages for the death of a human being); *Campbell v. Paddington Corporation*, [1911] 1 K. B. 869 (loss of a view).

(y) Street, *Foundations*, i, 461. At p. 470 he says: "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognised as parasitic will, forsooth, to-morrow be recognised as an independent basis of liability."

(z) On this difficult but interesting topic reference should be made to Green, *Rationale of Proximate Cause*; Bohlen, *Studies*, pp. 1—32; Jeremiah Smith, "Legal Cause in Actions of Tort", 25 H. L. R. 103, 223, 303, *Harvard Essays*, 649; Terry, "Proximate Consequences in the Law of Torts", 28 H. L. R. 10; Beale, "The Proximate Consequences of an Act", 33 H. L. R. 633, *Harvard Essays*, 730; McLaughlin, "Proximate Cause", 39 H. L. R. 149; Carpenter in 20 *Californian L. R.* 229, 396, 471; Bohlen in *Cleveland Bar Lectt.* pp. 128—32, and in particular to Sir John Salmond's treatment of the subject in the sixth edition, pp. 131—72. See also S. L. (now Lord) Porter in 5 *Camb. L. J.* 176.

(a) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25.

(b) *Derry v. Peek* (1889), 14 App. Cas. 337.

buildings not entitled to an easement of light or support (c); or by the withdrawal of underground water (d).

3. *Damnum suffered by one person and injuria by another.*—In the second class of case there is both *damnum* and *injuria*, but the *damnum* is suffered by one person and the *injuria* by another. A person who suffers *damnum* cannot recover compensation on the basis of *injuria* suffered by another. He who does a wrongful act is liable only to the person whose rights are thereby violated. He is not bound to make compensation to all persons who, in the result, suffer harm from his wrongdoing. The *damnum* and *injuria* must be united in the same person. Thus, the occupier of premises is bound to prevent the existence upon them of a nuisance to adjoining premises, but the duty is owing only to the owner and occupier of these adjoining premises, and not to strangers, whatever pecuniary interest they may have in the non-existence of a nuisance. So, in *Cattle v. Stockton Waterworks Company* (e) the plaintiff was a contractor who had undertaken to construct a tunnel under land belonging to another person. The defendants, the owners of adjoining waterworks, negligently allowed the escape of water from their main, and this escape rendered the completion of the plaintiff's contract much more difficult and costly than it would otherwise have been. Nevertheless the plaintiff was held to have no cause of action for the loss so suffered by him.

4. *Damnum of a kind not recognised by law.*—The third class of case is that in which, although the defendant's act is wrongful, and although the duty violated by him was a duty towards the plaintiff, nevertheless the damage resulting to the plaintiff is not recoverable, because it is not the kind of damage which it is the purpose of the law to prevent or to give redress for. Moved by divers considerations, sufficient or insufficient, of justice or public policy, there are certain kinds of damage which the law refuses to take account of as a ground for compensation, even when resulting from a wrongful act committed in violation of the rights of the plaintiff himself.

Thus at common law no damages can be recovered for the death of a human being. The protection of human life is left to the

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(c) *Dalton v. Angus* (1881), 6 App. Cas. 740.

(d) *Mayor of Bradford v. Pickles*, [1895] A. C. 587.

(e) (1875), L. R. 10 Q. B. 453. For other illustrations *vide infra*, ss. 134 (4), 149 (4), 150 (8), and see cases cited in 9th ed., s. 34 (3), n. (h). Contrast *The Okehampton*, [1913] P. 173. It is for this reason that the underwriters cannot sue directly a wrongdoer against property which they have insured.



criminal law (f). Again, when the plaintiff's cause of action is based on the provisions of some statute, it is not enough that the plaintiff should be one of the persons for whose benefit and protection the statute was made, and that he should have actually suffered damage. It is also necessary that the damage so suffered by him shall be the kind of damage which the statute was meant to prevent or to give compensation for. Damage of other kinds is irrecoverable, as in *Gorris v. Scott* (g).

5. *Damnum too remote*.—It remains to consider the fourth and last class of case in which damage is irrecoverable. In this class of case the plaintiff fails because the chain of causation connecting the defendant's act with the damage resulting from it is of such a nature that the law for some reason refuses to regard it as sufficiently continuous for liability.

Damage of this kind is said to be too remote—the casual connection between it and the defendant's act being regarded by the law as not sufficiently direct to create responsibility. This doctrine of remoteness of damage is one of very considerable obscurity and difficulty. This much, however, may be taken as certain, that no man is responsible *ad infinitum*, even to the person injured by him, for all the ulterior consequences of his wrongful act, however remote in time and however indirect the process of causation. "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes', or consequences of consequences" (h). A line has to be drawn somewhere and on some principle between the more direct and immediate consequences for which the wrongdoer is responsible, and those indirect secondary and remote consequences which the person injured must be left to bear for himself.

6. *Natural and probable consequences*.—The difficulty is to formulate a logical principle sufficient to distinguish the one class of consequences from the other. Prior to the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co.* (i) there was some authority (k) for formulating the principle as follows: That

(f) *Infra*, s. 92. Cp. the limited provisions for compensation under the Fatal Accidents Act, 1846; *infra*, s. 92 (9).

(g) (1874), L. R. 9 Ex. 125. *Vide infra*, s. 135 (3).

(h) *Liesbosch Dredger v. Edison*. [1933] A. C. p. 460, *per Lord Wright*.

(i) [1921] 3 K. B. 560.

(k) The authority for this principle mainly rests upon *dicta* of Pollock, C.B., in two cases decided upon the same day, May 8, 1850—*Rigby v. Hewitt*, 5 Ex. p. 243, and *Greenland v. Chaplin*, 5 Ex. p. 248. These *dicta* were of an extremely non-

a wrongdoer is liable only for damage which was intended by him or which, though not intended, was the natural and probable consequence of his wrongful act. On this principle no man is responsible for consequences neither intended nor probable. And a consequence is for this purpose natural and probable when it is so likely to result from the act that a reasonable man in the circumstances of the wrongdoer, and with his knowledge and means of knowledge, would have foreseen it and abstained from the act accordingly. In other words, the test of remoteness of damage was treated as identical with the test of negligence. In actions of negligence the foresight of a reasonable man was used as a test to determine not merely whether the defendant had been guilty of negligence, but also the extent of his liability for the consequences of such negligence. The principle was so stated by Bovill, C.J., in *Sharp v. Powell* (l).

There was, however, much authority to the contrary. In *Weld-Blundell v. Stephens* (m) Lord Sumner said: "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence. . . . This, however, goes to culpability, not to compensation."

7. *Direct consequences*.—The Court of Appeal in *Re Polemis and Furness, Withy & Co.* (n) rejected the supposed rule that a wrongdoer is only responsible for the natural and probable consequences of his act. The probability of evil consequences is a test of whether the defendant was negligent or not; but if he was negligent, he is liable for the physical consequences whether probable or not. In that case the charterers of the steamship *Thrasyvoulos* loaded in the hold a quantity of petrol in tins. During the voyage the tins leaked, and in consequence there was a considerable quantity of

committal character, and were not agreed by the other members of the Court, but were accepted by Sir F. Pollock (until the *Polemis Case*) and by Salmond as a correct statement of the law. Mr. Landon has suggested to me that some of the misconceptions that arose were due to a misunderstanding of the word "probable". In the expression "natural and probable" it was originally used in its technical sense of *probabilis* or provable; it has been taken in its popular sense of "likely to happen". See also Buckland in 51 L. Q. R. 646, and 9th ed., s. 159 (6), n. (2).

(l) (1872), L. R. 7 C. P. 253, 258. Cp. *Lynch v. Knight* (1861), 9 H. L. C. p. 600, per Lord Wensleydale; *Cory & Sons v. France, Fenwick & Co.*, [1911] 1 K. B. 114, 122.

(m) [1920] A. C. p. 984. Cp. *Smith v. L. & S. W. Ry.* (1871), L. R. 6 C. P. p. 21, per Channell, B., and Blackburn, J. So also Evans, P., in *H.M.S. London*, [1914] P. 72. The actual decision in *Smith v. L. & S. W. Ry.* rested upon the fact that there was evidence of negligence with respect to the actual consequences that ensued. And see the authorities collected in Beven, *Negligence*, i, pp. 82—106. Atkin, L.J., said in *Hambrook v. Stokes*, [1925] 1 K. B. p. 156, that *Re Polemis* "laid down no new law".

(n) [1921] 3 K. B. 560

petrol vapour in the hold. At one of the ports of call it became necessary for the stevedores to shift some of the cases of benzine, and for this purpose they placed a number of heavy planks at the end of the hatchway for use as a platform. While a sling containing the cases of benzine was being hoisted, the rope was negligently allowed to come into contact with these planks and to displace one of them, which fell into the hold. The fall of the plank was immediately followed by an outbreak of fire in the hold, caused by the ignition of the petrol vapour by a spark struck by the falling plank. The ship was totally destroyed by fire, and the Court of Appeal held the charterers liable to the owners for the loss, amounting to nearly £200,000. That the fall of the plank into the hold would set fire to and destroy the ship was found not to be a natural and probable consequence which ought to have been anticipated. It was an extraordinary and abnormal accident. But to allow the plank to fall into the hold was in itself an act of negligence, inasmuch as it would not improbably cause some damage to the ship or cargo. The charterers, therefore, being guilty of negligence were held liable for the disastrous consequences of that negligence, though in nature and magnitude those consequences were such as no reasonable man would have anticipated.

Scrutton, L.J. (o), said: "I cannot think it useful to say the damage must be the natural and probable result. . . . To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage that it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial" (p).

(o) At p. 576. Cp. *Bankes, L.J.*, at p. 571.

(p) The decision in *Re Polemis* has been criticised. Goodhart, in *Cambridge Legal Essays*, 101, said: "It is open to the grave objection that it is based on the fallacy that consequences 'flow from negligence'. Consequences are the result of an act. That act may be negligent as to certain consequences, and not as to others; it is, therefore, unscientific to talk of an act as having 'the legal quality' of negligence" (p. 118). Goodhart made a further attack upon the case in "The *Palsgraf Case*", in his *Essays*, p. 129. *Vide infra*, note (r). See other difficulties pointed out by Pollock, 38 L. Q. R. 165, and in *Torts*, pp. 28 *sqq.* For an approval of the decision as having actual relation to the facts of life and the needs of the Courts, see *McLaughlin* in 39 H. L. R. 164-5. "The idea is that the man who

8. *What is the true test of remoteness?*—It cannot yet be said with certainty whether the principle laid down in *Re Polemis* will be finally accepted in English law (q). At present, however, it holds the field and the following attempt to state the law is based on the assumption that the Court of Appeal were right. Even so, the decision does not mean that a person is responsible for all the consequences of his wrongful act. Still less does it enlarge the scope of the duties owed by the defendant. It is only if he has done a wrong to the plaintiff that he is liable to the plaintiff (r). It does not reject the rule as to remoteness of damage. It merely rejects as a test of remoteness the improbability of the consequences in question. But if this test is rejected what is to be substituted as the true test? Certain points seem to be fairly clear both on principle and authority, and we shall deal with these in the first place.

9. *Rule of remoteness is general and not limited to wrongs of negligence.*—The rule as to remoteness of damage applies not merely to wrongs of negligence, but to wrongs of all kinds, whether wilful, negligent, or of absolute liability. Even a wilful wrongdoer is not liable *ad infinitum* for all the consequences which in fact flow from his wrongful act.

10. *Intended consequences cannot be too remote.*—A consequence cannot be held too remote if it was actually intended by the wrongdoer. The defendant is held responsible for all those consequences which he actually desired and intended to inflict upon the plaintiff, however remote may be the chain of causation by which he effected his purpose. In *Quinn v. Leatham* (s) it is said by Lord Lindley: "The intention to injure the plaintiff . . . disposes of any question as to remoteness of damage."

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'starts something' should be responsible for what he has started." The decision was in accord with the view of Beven, *Negligence*, i, 91-2; Bohlen, *Studies*, pp. 1 et seq.; Jeremiah Smith, *ubi supra*, and Street, *Foundations*, i, 111-16.

(q) Lord Phillimore in the House of Lords appeared to accept it as correctly laying down the law in *Great Western Ry. v. Owners of S.S. Mostyn*, [1928] A. C. p. 91. So also Lord Wright in *Liesbosch Dredger v. Edison*, [1933] A. C. p. 461, and in *Bourhill v. Young*, [1943] A. C. 92, 107, 110, in which case Lord Russell said (at p. 101) that what the defendant ought to have contemplated as a reasonable man was relevant to the question of remoteness of damage, i.e., compensation, as well as to culpability. Lords Thankerton, Macmillan and Porter left the question open. See also 5 Camb. L. J. 176.

(r) *Vide supra*, s. 34 (3). This is the point which is illustrated by the decision of the New York Court of Appeals in *Palsgraf v. Long Island R. R.* (1928), 248 N. Y. 339. Pace Professor Goodhart, *ubi supra*, there is no difficulty in distinguishing that case from *Re Polemis*. Cp. *Bourhill v. Young*, [1943] A. C. p. 113, *per* Lord Porter; Green, *Judge and Jury*, ch. 8; McKerron, p. 133; Buckland in 61 L. Q. R. 647-9.

(s) [1901] A. C. 495, 537.

11. *Question of remoteness distinguished from question of existence of cause of action.*—The question as to remoteness of damage must always be carefully distinguished from the preliminary question whether the defendant has been guilty of any wrongful act at all. It is only if this latter question is answered in the affirmative that the first question arises at all. And the two questions are to be answered by the application of different tests. In considering the authorities it is not always easy to trace this distinction and to keep it clearly in mind. To treat as a question of remoteness what is really a question as to the existence of negligence or other fault, is a fertile source of confusion (*t*).

12. *Different kinds of cause.*—Various qualifying adjectives have been attached to the word “cause” to determine whether the consequence is too remote. Thus it has been said by some that damage is too remote unless the act of the defendant is the real, by some the effective, by some the substantial cause of it (*u*), whilst yet others using the language of the older logicians have distinguished the *causa causans* from the *causa sine qua non* (*tu*). It would seem clear, however, that none of these qualifying adjectives expresses any true or intelligible distinction. A cause which is not the real cause is not a cause at all. All causes are effective and substantial causes, otherwise they could not produce the consequences. Again, the act of the defendant may be a sufficient ground of liability even if it is merely the passive and antecedent *causa sine qua non* (*x*).

13. *Interruption of the chain of causation.*—Others again have said that the test of remoteness is whether the chain of causation has been interrupted or broken by some independent intervening cause: that a defendant remains liable for all consequences until such an interruption or breach frees him from further liability. Such is, however, the language of metaphor, and the metaphor is not completely satisfactory. It cannot mean that the chain of causation is broken or interrupted in fact; for in that case the damage would not be a consequence of the defendant's act at all,

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(*t*) Evatt, J., in *Chester v. Waverley Municipality* (1939), 62 C. L. R. 1, at p. 29, said that there had been a temptation to avoid the results of *Re Polemis* by denying the existence of a duty wherever the consequences were not the natural and probable consequences.

(*u*) *Englehart v. Farrant & Co.*, [1897] 1 Q. B. 240; *De la Bere v. Pearson*, [1907] 1 K. B. 483.

(*w*) *Weld-Blundell v. Stephens*, [1920] A. C. 956, 984, *per* Lord Sumner; *Bailiffs of Romney Marsh v. Trinity House* (1870), L. R. 5 Ex. 204, 208, *per* Kelly, C.B.; *Cutler v. United Dairies*, [1933] 2 K. B. p. 305, *per* Slesser, L.J.

(*x*) Salmond elaborated these criticisms in the sixth edition, pp. 146-8. *Cp.* Lord Sumner in *Weld-Blundell v. Stephens*, [1920] A. C. pp. 983-4.

and therefore no question of directness or remoteness could arise. The meaning can only be that, though the chain of causation remains unbroken in fact, it is deemed in law to have been interrupted, so as to save the defendant from further liability for ensuing damage. But the very question for determination is what facts are sufficient to induce the law to take this view of the matter (y).

14. *Remoteness depends on practical considerations and not on logical theory of causation.*—The test of remoteness is not to be looked for in the region of theoretical and logical discussion of the theory of causation. A lawyer is not concerned with the speculative difficulties which surround the idea of cause (z). It is sufficient for his purpose to say that an act is the cause of damage if the damage would not have happened if the act had not been done. The rule as to remoteness of damage is based on purely practical considerations of justice and expediency. "The law", says Lord Wright (a), "must abstract some consequences as relevant not perhaps on grounds of pure logic, but simply for practical reasons." The rule relates to those cases in which damage, though in fact caused by the defendant's wrongful act, is nevertheless caused in such a manner that the law does not consider that the defendant can be justly held responsible for it.

15. *Direct causation. Damage not necessarily too remote because of intervening cause.*—Lord Sumner thought (b) direct cause the best expression, and the Court of Appeal in *Re Polemis* the directness of the relation to be the test. In order to impose liability

(y) So in *Smith v. Harris*, [1939] 3 A. E. R. 960, 962, Scott, L.J., said that it was to take too narrow a view of legal responsibility to treat the inquiry into it as a mere inquiry into the chain of causation. It cannot be said that because a new cause comes in the person who set the chain of causation moving is thereby freed from all legal responsibility. But in spite of this and the difficulties pointed out by Salmond we shall find ourselves frequently falling back upon this metaphor. *Vide infra*, s. 34 (22).

(z) "The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of Judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning, but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a school-man could understand, then I am always very doubtful whether it can possibly be expressing the common law"; *Smith v. Harris*, [1939] 3 A. E. R. p. 967, *per du Parcq*, L.J.

(a) *Liesbosch Dredger v. Edison*, [1933] A. C. p. 460. In other words, the question of remoteness is really a question of fact, and the rules laid down by the Judges merely set out the principles which should guide a jury or Judge in determining whether in a particular case the damage is too remote. Goddard, L.J., in *Duncan v. Cammell Laird* (1944), 171 L. T. p. 199; *cp. Tilley* in 33 Mich. L. R. p. 837, and Bohlen in *Cleveland Bar Lectt.*, pp. 128-32.

(b) *Weld-Blundell v. Stephens*, [1920] A. C. pp. 983-4.

the damage must be the direct consequence, the direct effect, the direct result of the defendant's act and directly caused by it. Otherwise the damage is too remote and is irrecoverable. But it is clear that, as so used, the term direct cause cannot have its strict logical signification, as meaning the immediate or proximate cause, a cause so connected with the consequence that there is no intervening link in the chain of causation. The proposition that the defendant's act must be the direct cause of the damage in this sense would be clearly erroneous. A *nova causa interveniens* does not necessarily have the effect of making the consequence too remote. It may be an intervening cause but not a superseding cause which as such destroys the defendant's responsibility (c). The truth is that the term direct cause is used comparatively to mean a cause which is sufficiently direct—sufficiently closely connected with the damage done—to be recognised by the law as a ground of liability. It is only when read in this sense that the maxim *In jure non remota causa sed proxima spectatur* is in conformity with the law (d). But this gives no assistance in determining what degree of directness or proximity is sufficient for liability.

Some light was thrown upon the meaning of direct cause in this connection by the decision of the House of Lords in 1932 in *Liesbosch Dredger v. Edison* (e). In that case a dredger was sunk owing to the negligence of the *Edison*. The owners of the dredger required it for the performance of a contract, delay in the completion of which exposed them to heavy penalties. Owing to want of funds they could not purchase a dredger to take the place of the *Liesbosch*, and were forced to hire one at an exorbitant rate. It was held that the increased loss which the plaintiffs suffered due to their impecuniosity could not be recovered. Their impecuniosity was a separate and concurrent cause, not traceable to the acts of the *Edison*, and was outside the legal purview of the consequences of those acts (f). "Thus the loss of a ship by collision due to the other vessel's sole fault may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer." *Re Polemis* was distinguished as being "concerned

(c) Bohlen in *Cleveland Bar Lectt.*, p. 131.

(d) See on this maxim of Bacon, Jeremiah Smith. *Harvard Essays*, pp. 652-4; Beale, *ibid.* pp. 730-3; McLaughlin, 39 H. L. R. 155-6.

(e) [1933] A. C. 449. Cp. *Duncan v. Cammell Laird* (1944), 171 L. T. pp. 193, 199.

(f) Contrast *Burrows v. March Gas Co.* (1872), L. R. 7 Ex. 96. *Infra*, s. 34 (31).

with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiff's want of means". So also in a case of personal injuries the plaintiff may be either a poor labourer or a highly paid professional man, and this will be considered in assessing the damages, for it affects his profit-earning capacity. It is important to note that in the *Edison* the impecuniosity was not a *nova causa interveniens*, but a *causa antecedens*. In *Bourhill v. Young* (g) Lord Wright went further and said that the principle of *Re Polemis* is limited to "direct" consequences to the particular interest of the plaintiff which is affected.

16. *Novus actus interveniens distinguished from other cases of remoteness*.—It still remains to discover, if we can, whether there are any rules which will help us to determine whether a consequence is sufficiently direct for liability. For this purpose it is necessary to draw a distinction, for all cases of remoteness are divisible into two classes: those in which damage is too remote because of the operation of some *novus actus interveniens*—the intervention of human activity between the defendant's act and its consequences—and those in which damage is too remote for some reason other than *novus actus interveniens*. Prior to *Re Polemis* almost all the decided cases in which damage had been held too remote were cases of an *actus interveniens*. Such authorities as existed in cases of the other kind were few and were based upon that supposed rule as to natural and probable consequences which was rejected in *Re Polemis* (h). In *Aldham v. United Dairies, Ltd.* (i) Greene, M.R. and du Parc, L.J., treated the "spontaneous act" of an animal as a *novus actus*.

17. *The rule in Re Polemis*.—Leaving out of account in the meantime any special considerations applicable to cases of *novus actus interveniens*, the following principle is established by the case of *Re Polemis*. When the defendant has by his negligence or other wrongful act created a source of danger in violation of the plaintiff's rights it is no defence that the damage ensuing from the danger created by the defendant's wrongful act was brought about in a

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(g) [1949] A. C. p. 110. This limitation had been foreshadowed by Tilley in a valuable article in 33 Mich. L. R. pp. 847-51.

(h) An example is *Sharp v. Powell* (1872), 7 C. P. 253, a case discussed and explained in 9th ed., s. 34 (18), n. (h).

(i) [1940] 1 K. B. 507, at pp. 511, 513. Otherwise we should have to regard the rule in *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, as an exception to the rule in *Re Polemis*. *Vide infra*, s. 147 (1).



manner so abnormal and unlikely that the defendant had no reason to anticipate it, or that it was of a different kind from that which ought to have been anticipated, or was greater in amount than the defendant had any reason to expect.

So if the consequences of a slight personal injury are aggravated by the state of health of the person injured, the wrongdoer is none the less liable to the full extent, though he had no knowledge of that state of health and no reason to suspect it. "If a man", said Kennedy, J., in *Dulieu v. White (j)*, "is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages, that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." In the case of personal injuries "damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby-looking man in the street, and he turns out to be a millionaire engaged in a very profitable business which the accident disables him from carrying on; or you negligently and ignorantly injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice" (*k*).

Whether, however, in an action for damages for personal injuries a plaintiff can recover for the loss he has in fact sustained through inability to perform a contract of an unusual and exceptionally remunerative character is still an open question (*l*). It is submitted that on principle he should be able to do so (*m*).

18. *When damage is too remote though no actus interveniens.*—The foregoing principle, however, falls substantially short of the proposition that a wrongdoer is liable *ad infinitum* and without restriction for all the harmful consequences of his wrongful act. For the dangerous state of things created by a wrongful act frequently comes to an end before the act itself has ceased to be capable of producing further consequences. Accidents may ensue which would not have ensued had this alteration of the *status quo*

(j) [1901] 2 K. B. 669, 679. Cp. Blackburn, J., in *Smith v. London & S. W. Ry.* (1871), L. R. 6 C. P. 14, 22; Lord Wright in *Liesbosch Dredger v. Edison*, [1933] A. C. p. 461, and in *Bourhill v. Young*, [1943] A. C. pp. 109–10.

(k) *Per* Scrutton, L.J., in *The Arpad*, [1934] P. pp. 202–3; cp. *Liesbosch Dredger v. Edison*, [1933] A. C. p. 461, *per* Lord Wright; *The Edison*, [1931] P. p. 237, *per* Langton, J.

(l) See Greer, L.J., in *The Arpad*, [1934] P. p. 221.

(m) Even although such damage can only by a stretch of language be said to be an "immediate physical consequence of the act". *Vide supra*, s. 34 (15). Cp. Winfield, pp. 79–80; Goodhart, 2 Toronto L. J. p. 21, n. 85.

*ante* not been brought about. Those accidents are doubtless consequences of the defendant's wrongful act, inasmuch as they would not have happened but for that act. But they are not the outcome of any dangerous conditions created by the defendant in violation of the plaintiff's rights (*mm*).

19. *Damage not due to any danger created by wrongful act.*—So also, even if the operative influence of the defendant's act in creating a dangerous condition in violation of the plaintiff's rights has not become thus exhausted by the lapse of time, yet the accident complained of may have had no causal connection with the dangerous condition, but may be one which was just as likely to have happened to the plaintiff even if the wrongful act had not been committed. It may be due to an independent, separate and concurrent cause, extraneous to and distinct in character from the tort (*n*). Such damage, also, is too remote.

"There is an old fallacy," said Scrutton, L.J. (*o*), "*post hoc propter hoc*—a fallacy amusingly illustrated by the question asked by the authors of *The Rejected Addresses*: 'Who fills the butchers' shops with large blue flies?' the answer being that they and the other evils enumerated were there owing to the existence of Napoleon. *Post hoc propter hoc* is generally wrong." Let us take as an illustration an assault committed by the defendant, in consequence of which the plaintiff requires medical attention. On his way to the hospital he is struck by a falling tile, or trips over some obstruction in the street, and breaks his leg. Is the defendant liable for this further injury? His wrongful act was clearly a cause of it, for if he had not assaulted the plaintiff, the plaintiff would not have been in the street at the particular time and place at which he was hit or fell. Yet it is clear that notwithstanding this causal connection between the wrongful act and the damage, the defendant is not responsible (*p*). The damage is too remote. The defendant's act, though a cause of it, is not the direct cause of it within the meaning of the rule as to remoteness of damage. A bare causal connection of this kind is not sufficient for liability.

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(*mm*) If a bomb falls on a railway track and makes a crater and subsequently through negligence a railway engine falls into the crater and the driver is killed, it is not the impact of the bomb but the negligence which causes the injury: *Greenfield v. L. & N. E. Ry.* (1944), 61 T. L. R. 44.

(*n*) *Liesbosch Dredger v. Edison*, [1933] A. C. p. 460.

(*o*) *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. p. 569. Cp. *Cutler v. United Dairies*, [1933] 2 K. B. p. 305.

(*p*) *The San Onofre*, [1922] P. 238. Cp. *Metropolitan Ry. v. Jackson* (1877), 3 App. Cas. p. 198, *per* Lord Cairns, L.C.

20. *Suggested rule formulated.*—Apart from the case of *novus actus interveniens*, it is submitted that the rule may be formulated as follows: The liability of a defendant for the unintended consequences of his wrongful act is limited to the consequences which flow from the act by way of some dangerous condition thereby created in violation of the plaintiff's rights; such a condition exists at the peril of the wrongdoer, and he must pay for all the results thereof in so far as they concern the particular interest of the plaintiff affected (q) however unexpected and abnormal in nature, magnitude, or mode of causation they may be, but the defendant's liability does not extend to consequences which, though they flow from the act itself, are independent of any such risk so wrongfully imposed on the plaintiff, either because that risk has already ceased to exist, or because, though still existing, the consequences were due to some independent cause.

21. *Effect of actus interveniens.*—It remains to consider how far, if at all, the general principle as to remoteness of damage is affected by the circumstance that the damage has been brought about by the *novus actus interveniens* (r) of some other person than the defendant himself. For one proposition beyond question is that "human action does not *per se* sever the connected sequence of acts" (s). In discussing this difficult subject we shall consider amongst others cases in which the true question is: Is there a cause of action at all? Culpability and compensation are distinct questions. Every true question of remoteness of damage assumes some breach of a legal duty owing by the defendant to the plaintiff, and asks what limits are imposed upon the defendant's liability for the consequences resulting from that breach of duty. Nevertheless, the question whether there is a cause of action is in many cases so intimately connected with questions as to remoteness of damage, and is often so implicated with those questions on the facts of the particular case, that it is necessary to consider the two questions together (t).

(q) *Bourhill v. Young*, [1943] A. C. p. 110, *per* Lord Wright. *Vide supra*, s. 34 (15).

(r) *du Parcq, L.J.*, thinks that we could get on equally well without this phrase: *Ingram v. United Automobile Services*, [1943] 2 A. E. R. p. 73; but, like the metaphor, "chain of causation", it is a conveniently compendious expression, and hallowed by long usage. *Cp.* Lord Wright in *The Oropesa*, [1943] P. p. 36.

(s) *The Oropesa*, [1943] P. p. 37.

(t) The questions have not been kept distinct in the cases, e.g., the action for nervous shock, *infra*, s. 91 (4), has often been treated as a question of remoteness. (Winfield thinks still that it is more properly so regarded: 27 Col. L. R. p. 7.)

22. *Two tests of causation.*—There are two main views (u) as to the proper test of causation, each of which has been given currency in judicial pronouncements. The one is that of probability, the other is that of isolation. It is in dealing with the effect of a *novus actus interveniens* that the divergence between these two views is most marked.

*The probability test.*—Sir John Salmond's inclination was to accept probability as the true test. That test involves two propositions: first, if a consequence which actually results from the defendant's tort is a probable consequence, then the defendant is liable; secondly, if a consequence which actually results from the defendant's tort is an improbable consequence, then the defendant is not liable (v). The second proposition, as we have seen, is clearly not of universal application; the first proposition generally accords with the law. But it is generally held that *Re Polemis* rejected the probability or "foreseeability" test in questions of remoteness. By that decision the line is drawn sharply between foresight and what American writers have called "hindsight". The existence of negligence is determined by the probabilities ascertainable at the time; the liability for its consequences extends to all those that occur in the ordinary course of nature (w).

*The isolation test.*—The isolation test is best expressed in the words of Lord Sumner in *Weld-Blundell v. Stephens* (x): "In general (apart from special contracts and relations and the maxim *Respondet superior*), even though A is in fault, he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause. It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that in a word he insulates A from C." Or in simpler language we may say that if A's original fault has merely created

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The intimate connection of the two questions is shown by the influence which the doctrine of remoteness has had upon the development of the conception of negligence: Holdsworth, H. E. L., viii, p. 449.

(u) For other tests, see Jeremiah Smith, *Harvard Essays*, pp. 652-7; 25 H. L. R. pp. 106-11.

(v) Jeremiah Smith, *Harvard Essays*, p. 660; 25 H. L. R. p. 114.

(w) Bohlen, *Studies*, p. 8.

(x) [1920] A. C. p. 986.

the occasion for B's injurious act A will not be liable (y). It would not appear that in principle it matters whether the *novus actus* be justifiable, lawful, negligent or criminal or whether it be the act of the plaintiff or of a third party (z). According to this view, if it be "new and independent", an act of volition, not automatic, reflex or without consciousness of what the actor was doing, the chain of causation will be broken, and the original wrongdoer will be relieved from liability. In such a case the original fault is not the direct cause of the damage; there can be no question, therefore, of liability under the rule of *Re Polemis*.

According to the opinion expressed by Lord Sumner in *Weld-Blundell v. Stephens* (a) it is immaterial that the intervening act is the probable consequence of the defendant's own wrongful act: "That a jury can finally make A liable for B's act, merely because they think it antecedently probable that B would act as he did apart from A's authority or intention, seems to me to be contrary to principle and unsupported by authority." This, undoubtedly, is a hard saying. If A by his wrongful act exposes B to the risk of injury through the wrongdoing of C, and that risk is so great that a jury regard the result as a natural and probable consequence of A's wrongdoing, it is not easy to see why he should be held exempt from liability for the damage so caused by him. *A fortiori* is this the case when C's act is lawful, for in such a case B has no right of action against anyone for the loss he has suffered (b).

23. Sir John Salmond was reluctant to accept Lord Sumner's dictum as a correct statement of the law (c), and there are

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(y) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. p. 36, *per* Lord Blanesburgh. *Cp. Duncan v. Cammell Laird* (1942), 171 L. T. p. 193, *per* Lord Greene, M.R. But see Jeremiah Smith, *Harvard Essays*, pp. 656-7, 25 H. L. R. 110-11.

(z) A common view (*cp. per* Greer, L.J., in *Bloor v. Liverpool Docking Co.*, [1936] 3 A. E. R. p. 402) is that only a wrongful act by a third person will break the chain of causation, sometimes known as "the last, or nearest, wrongdoer rule": for criticism of it, see Holmes in 8 H. L. R. pp. 9-11; *Harvard Essays*, pp. 171-3; Jeremiah Smith, 25 H. L. R. pp. 111-13, *Harvard Essays*, pp. 657-9. Beven, *Negligence*, 44, said in accordance with the view in the text: "To fix liability for injuries brought about through a complicated state of facts, the last conscious agent must be sought." This statement is discussed in Bohlen, *Studies*, 109-33. *Cp. Buckner v. Ashby and Horner*, [1941] 1 K. B. 321.

(a) [1920] A. C. p. 988.

(b) It is probably for this reason rather than for the reason that it is improbable that third persons will act negligently or wrongfully that there is such a numerical preponderance of opinion to the effect that if the intervening act is lawful it does not break the chain of causation: see Jeremiah Smith, *Harvard Essays*, pp. 664-7, 25 H. L. R. pp. 118-21; Bohlen, *Studies*, pp. 504-11, *Harvard Essays*, pp. 472-8 21 H. L. R. pp. 236-42.

(c) See 6th ed., s. 36 *passim*. For an able statement of this view see J. M. McLaughlin: "Proximate Cause", 39 H. L. R. 149.

undoubtedly many decisions to be found in the books which are expressed to rest upon the principle that damage which is the natural and probable consequence of the defendant's wrongdoing is imputable to him notwithstanding an intervening act (*d*).

So Greer, L.J., in *Haynes v. Harwood* (*e*) said: "If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (*f*), the accident can be said to be 'the natural and probable result' of the breach of duty."

24. *Probability and isolation tests combined*.—In the presence of such a conflict of authority it is impossible to set out with any confidence a dogmatic statement of the present position of the law, but it is submitted that as the law stands neither the probability test nor the isolation test gives the correct result in every case.

It is important to remember that in *Re Polemis* the only problem with which the Court was concerned was: Will the fact that the consequences were unforeseeable prevent a defendant guilty of actionable negligence from being liable for those consequences? The Court was not dealing with the entirely different question: Will a defendant be liable for the foreseeable consequences of his act, even although they are not direct consequences? It is perfectly true that some of the general propositions laid down by the Court were wide enough to cover the answer to both questions (*g*), but it is permissible to refer to the words of Lord Porter, written before he was elevated to the Bench: "The fact is that Judges like the rest of us are human and, where for a particular decision accuracy is not essential, will use several words in the same sense or one in several. It is not by pressing the meaning attributed to a word in one or two instances that its true meaning can be obtained" (*h*).

(*d*) See authorities cited by Jeremiah Smith, *Harvard Essays*, 664-9, and the following more recent cases: *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927), 138 L. T. p. 370 (Lord Haldane); *Domine v. Grimsdall* (1937), 156 L. T. p. 459 (Atkinson, J.); *Liffen v. Watson*, [1940] 1 K. B. p. 557 (Slesser, L.J.); *Bourhill v. Young*, [1943] A. C. p. 101 (Lord Russell); and, in contract, *Banco de Portugal v. Waterlow & Sons* (1931), 145 L. T. p. 360 (Greer, L.J.); *S.C.*, [1932] A. C. pp. 480-1 (Lord Warrington). See also Bohlen in *Cleveland Bar Lectt.* pp. 130-2.

(*e*) [1935] 1 K. B. pp. 153, 156.

(*f*) (1854), 9 Ex. 341.

(*g*) *E.g.*, [1920] 3 K. B. p. 574, *per* Warrington, L.J., p. 577, *per* Scrutton, L.J. See also *Smith v. L. & S. W. Ry.* (1870), 6 C. F. p. 21, *per* Channell, B., p. 21, *per* Blackburn, J.; *The Argentino* (1888), 13 P. D. p. 201, *per* Bowen, L.J.

(*h*) 5 Camb. L. J. p. 189.

And the same is true of propositions of law laid down by the Judges sufficiently accurate for the purpose of the case in hand.

It is submitted that as a general principle the defendant will be liable for all the foreseeable consequences of his act. This result may be arrived at in either of two ways: We may either say that all foreseeable consequences are direct consequences or we may say that the defendant will be liable for consequences which are foreseeable even though not direct. The former statement is more consistent with a body of *dicta* (i), the latter seems more consistent with principle (k). We shall, however, follow authority; the result is the same.

On either view it is necessary carefully to distinguish the cases in which the *novus actus* is foreseeable from those in which it is not.

25. *Novus actus intentionally procured by defendant*.—Clearly the defendant will be liable wherever he has actually authorised or instigated the intervening act (l). He will also be liable if he has intentionally induced or procured the intervening act by putting the necessary means, opportunity, or inducement in the way of him who does it. If A publishes a libel with intent that B shall repeat it, A is responsible for such repetition no less than if he had authorised it (m). “The intention to injure the plaintiff . . . disposes of any question of remoteness of damage” (mm).

The Courts have been caused much trouble in connection with medical certificates upon which reception orders are made for the detention of lunatics. A doctor gives a written certificate to the effect that in his opinion X is of unsound mind. A justice of the peace then, if he is satisfied that X is a lunatic, makes an order for the reception and detention of X in an institution for lunatics under section 16 of the Lunacy Act, 1890. Is the doctor’s certificate the cause of X’s detention? Now certain points are clear: the justice, so long as he acts honestly in the discharge of his duties, is not

(i) *E.g.*, per Lord Finlay in *London Joint Stock Bank v. Macmillan*, [1918] A. C. pp. 789–90; per Greer, L.J., in *Haynes v. Harwood*, [1935] 1 K. B. p. 156; and cases cited *supra*, s. 34 (23), n. (d).

(k) *Infra*, s. 34 (39). If the former view is the correct view, it would seem that all foreseeable consequences would fall under the first branch of the rule in *Hadley v. Barendale*. Cp. Porter in 5 Camb. L. J. pp. 188–90; Winfield 80–2. Winfield thinks that the criterion of “directness” is foreseeability, except in the case of physical consequences, which need not be foreseeable to be imputable. *Vide supra*, s. 34 (15). But see Goodhart in 51 L. Q. R. 128.

(l) *Supra*, s. 34 (10).

(m) *Weld-Blundell v. Stephens*, [1920] A. C. p. 999, per Lord Wrenbury.

(mm) *Quinn v. Leatham*, [1901] A. C. p. 537, per Lord Lindley.

liable to an action at the suit of X (n). Nor is he bound by the certificate; he can decide as he pleases; the certificate is only evidence upon which he acts. It also seems clear that after there has been a new medical examination any further detention is not due to the original certificate (o). But is the original detention caused by the doctor's certificate as well as by the justice's order? To this it is quite impossible to give a definite answer, but the balance of authority seems to support the view that the doctor's certificate is a cause of the detention (oo), and this can be explained upon this ground. The justice's order, though a *novus actus interveniens*, has been intentionally procured by the issue of the doctor's certificate. The doctor is an expert; the justice is a layman; he will naturally act upon the expert evidence, and the doctor intends that he shall do so.

25a. *Where the law imposes a duty of care to guard against the novus actus.*—In some cases the law imposes a duty to take care that harm shall not be caused by the act of a third party. Clearly in such cases if harm is caused by a third party's act the damage is imputable to the person who has failed in the duty of care. Thus in *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.* (p) the defendants, the Northwestern Utilities, carried natural gas at high pressure to consumers in the city of Edmonton. The City, whilst constructing a storm sewer beneath the defendant's main, caused a break in it through which the gas escaped with the result that a hotel was destroyed by fire. It was held that it was the duty of the defendants who were engaged upon a dangerous operation to guard against the risk of damage from the City's activities. With such cases may be compared the liability of an employer for the acts of an independent contractor (pp).

26. *Where the intervening actor is not fully responsible.*—Again the chain of causation is not broken and the consequence is direct if

(n) *Everett v. Griffiths*, [1921] 1 A. C. 681. The Mental Treatment Act, 1930, s. 16, now affords protection to all persons acting under the Lunacy and Mental Treatment Acts, 1890 to 1930, unless they have acted in bad faith or without reasonable care.

(o) *Harnett v. Bond*, [1925] A. C. 669.

(oo) McCardie, J., reluctantly came to this conclusion after a careful examination of the authorities in *De Freville v. Dill* (1927), 138 L. T. 83. Lord Finlay, Lord Blanesburgh, Atkin, L.J., Horridge, J., and (semble) Lord Cave, all interpret the law as stated in the text. On the other side are Scrutton, L.J., Lord Reading and, had he been unfettered by authority, McCardie, J. It also seems possible that Lord Sumner, Lord Wrenbury and Lord Carson share their view. For a suggested reform in the procedure which would relieve the doctors from liability in such cases, see 172 L. T. Jo. 258. In Italy also the doctor's certificate is regarded as a cause of the detention: Ferri, *Principii di Diritto Criminale*, p. 452.

(p) [1936] A. C. 108.

(pp) *Supra*, s. 31 (4).



the *novus actus interveniens* is the act of some person who is not fully responsible for his acts, and whose lack of responsibility should have been foreseen, such as a child, a person in a state of excusable ignorance or one in a state of excusable alarm produced by the defendant's own wrongful act (q). "Children acting in the wantonness of infancy (r) and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief" (s).

27. *The doctrine of "alternative danger"*.—We shall later discuss the doctrine of "alternative danger" in relation to contributory negligence (t). A similar principle applies equally where the damage has been caused by a third person who has been put in peril. So in *Scott v. Shepherd* (u) the defendant threw a lighted squib into a crowd; one of the crowd in order to prevent injury to himself and his wares threw it away from himself, and it exploded near the plaintiff and put out his eye. The defendant was held to be responsible for the plaintiff's injury.

In *S.S. Singleton Abbey v. S.S. Paludina* (w), Lord Sumner wished to limit the application of this principle to those cases in which the danger is personal danger (x) and the plaintiff or third person has taken "instant action on the first alarm", where the choice has been automatic and without reflection. But Lord Phillimore thought the doctrine extended to cases in which the

(q) *Weld-Blundell v. Stephens*, [1920] A. C. p. 985, *per* Lord Sumner.

(r) As in *Martin v. Stanborough* (1924), 41 T. L. R. 1 (motor car left on hill); *Shiffman v. Order of St. John*, [1936] 1 A. E. R. 557 (meddling with ropes of flag-pole); *Wells v. M. W. B.* (1937), 54 T. L. R. 104 (tampering with valve-box in road). Cp. *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. p. 130. Other cases in which the intervening act of a child has been held not to relieve the defendant from liability are: *Dixon v. Bell* (1816), 5 M. & S. 198, and *Bebee v. Sales* (1916), 32 T. L. R. 413, both of which were cases of liability for dangerous things. Contrast *Barker v. Herbert*, [1911] 2 K. B. 633, and *Haynes v. Harwood*, [1935] 1 K. B. 146.

(s) *Latham v. Johnson*, [1913] 1 K. B. p. 413, *per* Hamilton, L.J. (afterwards Lord Sumner).

(t) *Infra*, s. 124 (10).

(u) (1773), 2 W. Bl. 892.

(w) [1927] A. C. 16. For the facts, *vide infra*, s. 34 (33). Cp. *Admiralty Commissioners v. S.S. Volute*, [1922] A. C. p. 136, *per* Lord Birkenhead.

(x) *Vide infra*, s. 124 (10).

plaintiff or third person had acted reasonably and "not unnaturally" and to cases in which the danger was danger to property.

Lord Phillimore's view has been preferred. In *Canadian Pacific Ry. v. Kelvin Shipping Co., Ltd.* (y) Lord Haldane said: "The damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created. What those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things, which extends to the reasonable conduct of those who have sustained the damage and who are seeking to save further loss." In such cases "the burden of showing that the chain of causation started by the initial injury has been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action, and not merely to action on an erroneous opinion by people who have *bona fide* made a mistake while trying to do their best" (z). "To break the chain of causation", said Lord Wright in *The Oropesa* (a), "it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic"—something "outside the exigencies of the emergency". "The question is not whether there was a new negligence but whether there was a new cause." In *The Genua* (b) Langton, J., applied this principle in a case where there were no circumstances of urgency or emergency, though the captain had not got unlimited time in which to make up his mind what was the proper course to pursue.

Even those who take the stricter view of Lord Sumner admit that the circumstance that the danger so created by the defendant

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(y) (1927), 138 L. T. 369, 370 (reported *sub tit.* *The Metagama*, 29 Ll. L. Rep. 253).

(z) Cp. in contract: "It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency": *Banco de Portugal v. Waterlow & Sons*, [1933] A. C. p. 506, *per* Lord Macmillan.

(a) [1943] P. 32 at p. 39.

(b) [1936] 2 A. E. R. 798.

is known to the plaintiff, and the risk is knowingly run by him, is not necessarily a defence. In *The City of Lincoln* (c) the plaintiff's ship was injured in a collision due to the defendant's negligence, and lost her steering compass and charts. Her captain thereupon made for a port of safety, but ran ashore in the course of the voyage owing to the loss of those requisites of safe navigation. It was held that the damage was not too remote, though the direct and immediate cause of it was the supervening act of the captain, the plaintiff's servant. "In that case the captain, it is true, steered his own course, as every navigator must, but he steered it wrong because his means of observation, the log, etc., had been carried away in the collision. The hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortunes. But for this the decision must have been otherwise" (d).

We may, perhaps, take this metaphor of Lord Sumner as laying down the correct test. If the hand of the original wrongdoer is still heavy upon the intervening actor the original wrongdoer has caused the damage at law.

28. *Novus actus in pursuance of duty*.—On the same principle the consequence is direct where the intervening act is that of a person acting under the compulsion of a legal or probably even only a moral duty. The commonest example is the rescue cases, which we have already discussed (e). The action of the rescuer follows naturally and properly in the natural sequence of events from the act of the wrongdoer (f). Similarly, in *D'Urso v. Sanson* (g), where a night watchman went back into his master's burning premises to preserve them and received injuries of which he died it was held that his act in returning to the place of danger was not a *novus actus*.

29. *Novus actus in defence of rights*.—Again, the chain of causation is not treated as broken where the intervening act is that of a person acting in the exercise or defence of his rights and without

(c) (1889), 15 P. D. 15.

(d) Lord Sumner in *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. p. 27. Followed in *The Oropesa*, [1942] P. 140; [1943] P. 32, where (as reported in [1943] 1 A. E. R. p. 215) Lord Wright said the ship was "in the grip of the casualty".

(e) *Supra*, s. 8 (5).

(f) *The Gusty*, [1940] P. 165, per Bucknall, J.

(g) [1939] 4 A. E. R. 26.

intention to injure others (*h*). Thus, in *Clark v. Chambers* (*i*) the defendant illegally obstructed a highway by placing in it a horizontal bar armed with iron spikes. Some third person, desiring to pass along the road and entitled to do so, removed the obstruction and negligently placed it in an upright position on the footpath. The plaintiff, walking there on a dark night, came in contact with the obstruction, and one of the spikes entered his eye. The damage was held not too remote. The same explanation can be given of *Summers v. Salford Corporation* (*k*) where the plaintiff opened and cleaned a window which jammed because of a broken sash-cord and received an injury to her hand. She was only doing what any intelligent observer would have expected her to do (*l*).

But all these are only illustrations of the general principle, that if the *novus actus* must have been anticipated by the defendant, the original act will be treated as the direct cause of the damage. Thus in *R. v. Moore* (*m*) the defendant used his premises as a pigeon-shooting ground and in consequence idle persons collected outside the grounds with the object of shooting the pigeons which escaped. The defendant was held liable for the damage done by the idle persons, notwithstanding that their presence was against his wish.

30. *Acts done to minimise damage.*—It is the duty of the plaintiff to minimise damage. No act which he does reasonably

(*h*) See Bohlen, *Studies*, pp. 452-7, *Harvard Essays*, pp. 505-9, 20 H. L. R. pp. 22-6. "There can be no real volition where there is no choice between at least two alternatives, neither of which involves the abandonment of a legal right or the relinquishment of the performance of a duty." A good illustration of the principle is *Clayards v. Dethick* (1848), 12 Q. B. 439, the facts of which are given *supra*, s. 8 (8).

(*i*) (1878), 3 Q. B. D. 327. Cp. *Buckner v. Ashby and Horner*, [1941] 1 K. B. p. 336. *Clark v. Chambers* has, however, been doubted. Lord Sumner said in *Weld-Blundell v. Stephens*, [1920] A. C. p. 989, that many persons had felt difficulty in fitting it into any coherent relation with the rest of the law on this subject. He cited as further illustrations of the same principle *The Sisters* (1876), 1 P. D. 117, which seems to be a clear case of "alternative danger", and *Halestrap v. Gregory* (1895), 64 L. J. Q. B. 415, which seems to rest upon a contractual duty. Lindley, L.J., in *The Bernina* (1887), 12 P. D. p. 90, treated *Clark v. Chambers* as a case of joint concurrent negligence, whilst Lush, J., in *Ruoff v. Long*, [1916] 1 K. B. p. 156, treated it as falling under the exception of dangerous things.

(*k*) [1943] A. C. 283, at pp. 296-7. But Lord Wright's illustration of the negligent motorist who cannot escape liability for injuring a pedestrian by pointing out that if he had stayed at home he would not have been injured is scarcely relevant. That would be a case of *actus antecedens*.

(*l*) Similarly, to continue to use a kitchen when the ceiling is known to require repairs which the landlord has undertaken to put in hand does not sever the causal chain between his breach and the damage caused by its collapse: *Porter v. Jones* (1942), 112 L. J. K. B. 173 (a contract case).

(*m*) (1832), 3 B. & Ad. 184. Cp. *Scott's Trustees v. Moss* (1889), 17 R. 32, and *R. v. Carlile* (1834), 6 C. & P. 636, in which the case of the beautiful Miss Very, who attracted large crowds to look at her, was discussed on the same lines (at p. 646).

with that object in view will break the chain of causation. Thus in *Dee Conservancy Board v. McConnell* (n) a ketch belonging to the defendants sank owing to their negligence and obstructed the navigation of the river of which the plaintiffs were conservators. The defendants abandoned the wreck and the plaintiffs paid £1,500 to have the wreck removed. It was held that they could recover this from the defendants. They were entitled to minimise the damage for the future.

31. *Concurrent causes.*—If two direct causes concur and operate at the same time and lead to a common result then there is no *novus actus*, and each actor will be the cause of the damage done. Such was the case in *Burrows v. March Gas Co.* (o). The defendants negligently allowed gas to leak from a gas-pipe fitted up by them in the plaintiff's shop, and a gasfitter employed by the plaintiff to repair the leak negligently approached it with a lighted candle in his hand, whereupon an explosion occurred which damaged the plaintiff's property. It was held that the plaintiff had a good cause of action against the gas company. No harm would have ensued from the defendants' negligent act but for the subsequent and independent negligence of the gasfitter, but the negligence of the defendants was a continuing negligence.

32. *Defamation.*—As the authorities stand one exception must be admitted to the general rule that a foreseeable *novus actus* does not break the chain of causation. In *Ward v. Weeks* (p) it was decided that in an action for slander the defendant cannot be held responsible for damage caused not by the utterance of the defamatory words by the defendant himself, but by their unauthorised and unintended repetition by other persons. "It was the repetition", said Tindal, C.J., "which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage."

(n) [1928] 2 K. B. 159. Cp. *The Ella*, [1915] P. 111. See, however, *Banco de Portugal v. Waterlow & Sons*, [1932] A. C. p. 471, *per* Sankey, L.C.

(o) (1872), L. R. 7 Ex. 96. It should be noted that this action was brought for breach of a contractual duty. Cp. *The Kate*, [1935] P. 100. Examples where there was no contract are *Hill v. New River Co.* (1868), 9 B. & S. 303; *Sharp v. Avery*, [1938] 4 A. E. R. 85; *Smith v. Harris*, [1939] 3 A. E. R. 960 (treasure-hunt where pillion-rider injured in collision between two motor-cycles in a string).

(p) (1830), 7 Bing. 211. Cp. *Weld-Blundell v. Stephens*, [1920] A. C. 956 (libel); *Bradstreets British v. Mitchell*, [1933] Ch. 190. Contrast *Howard v. Odhams Press*, [1938] 1 K. B. 1, where the repetition of a confession made by the plaintiff, in breach of an undertaking to keep it secret, did not enable him to recover other than nominal damages when he was expelled in consequence from his union. The loss he suffered was held to be due to his own wrongdoing.

In these cases the mere fact that it was antecedently probable that the intervening actor would act as he did—"for more than half of human kind are tale-bearers by nature"—did not make the defendants liable (q). In the light of these authorities we must recognise that cases of defamation are an exception to the general principle (r).

33. *Where novus actus could not be anticipated.*—But where the *novus actus* cannot be anticipated the chain of causation is broken, and the consequences will not be regarded as direct, and then it matters not whether the intervening act is one of wilful wrongdoing, negligent, or lawful.

In *Cobb v. Great Western Ry.* (s) the intervening act was one of wilful wrongdoing. There the defendant company was guilty of negligence in allowing a railway carriage to be overcrowded, in consequence of which the plaintiff, a passenger, was hustled and robbed. This damage was held to be too remote.

In *S.S. Singleton Abbey v. S.S. Paludina* (t) the *novus actus* was negligent. There the *Paludina* owing to her negligence dragged her anchors and fell upon the *Singleton Abbey* and parted her moorings so that the *Singleton Abbey* in turn fell upon the *Sara* and cast her adrift. Twenty minutes later the *Sara*, whilst manœuvring in consequence of the collision, got under the star-board quarter of the *Singleton Abbey*, when the revolving propeller of the *Singleton Abbey* struck the *Sara* with the result that the *Sara* was sunk and the propeller was damaged. It was held in the House of Lords that the negligence of the *Paludina* was not the direct cause of the final collision, since it was not proved that the *Sara* in acting as she did was free from blame. The negligence of the *Paludina* had created the occasion of the injury but had not directly caused it. So again negligent medical treatment may be a *novus actus* (tt).

In *Harnett v. Bond* (u) the *novus actus* was lawful. The plaintiff who had been detained as a lunatic in a licensed house, whilst granted leave of absence on trial, called upon a Commissioner in Lunacy. The Commissioner, after seeing him, telephoned to the manager of the licensed house that the plaintiff was not in a fit

(q) *Weld-Blundell v. Stephens*, [1920] A. C. pp. 988, 991, *per* Lord Sumner.

(r) Cp. Jeremiah Smith, *Harvard Essays*, 664-9. Cp. Fraser, *Libel*, pp. 183-5.

(s) [1893] 1 Q. B. 459; [1894] A. C. 410.

(t) [1927] A. C. 16.

(tt) *Rothwell v. Caverswall Co.* (1944), 171 L. T. 289. But see 61 L. Q. R. 6.

(u) [1925] A. C. 669.

state to be at large, and detained the plaintiff for three hours while the manager sent a motor car to take the plaintiff back to the licensed house, where he was then detained for nine years. The Commissioner was found guilty of false imprisonment, but the damages were limited to the period before the retaking of the plaintiff by the manager. The Commissioner could not and did not direct or authorise the manager to retake the plaintiff or confine him in the licensed house; the retaking and confinement were the independent acts of the manager, and each of them was a *novus actus interveniens* sufficient to break the chain of causation (x).

34. *Voluntary acts of plaintiff whereby loss is intentionally incurred.*—The *novus actus* is sometimes the act of the plaintiff himself (x). Damage is made too remote by the *actus interveniens* of the plaintiff, not only when his act amounts to contributory negligence, but also when it is a voluntary act by which he intentionally brings that damage upon himself. Thus, in the case of the *S.S. Amerika* (z), the Crown sued for the loss of a submarine sunk in a collision by the negligent navigation of the defendant's steamship, and claimed, *inter alia*, the capitalised value of the pensions paid by the Crown to the relatives of the crew of the submarine who were drowned. It was held by the House of Lords that apart altogether from the rule that an action will not lie at common law for causing the death of a human being, the damage so claimed was irrecoverable on the ground of remoteness, inasmuch as these pensions were not claimed as of right, but were merely compassionate allowances made at the good pleasure of the Crown. The loss was incurred by "purely ultroneous conduct" (a). Remoteness in such a case does not depend on whether the *actus interveniens* of the plaintiff is in any way negligent, unreasonable, or otherwise improper, but is based merely on the fact that it is voluntary (that is to say, not under the compulsion of any legal obligation) and that the loss thereby caused is intentional on the plaintiff's part. Such loss he must bear himself, notwith-

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(w) Cp. *Speake v. Hughes*, [1904] 1 K. B. 138, where an employee was dismissed because of a statement made to his employers that he had left his house with his rent unpaid and it was held that the dismissal was not a natural and probable consequence of the statement. As this was a case of defamation, even if the employers' act had been the natural and probable consequence the defendant would probably not have been liable. *Vide supra*, s. 34 (32).

(x) E.g., *The San Onofre*, [1922] P. 243.

(z) [1917] A. C. 39. Contrast *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209, where the Crown's payment of wages and hospital expenses did not increase the damages to which the defendant would have been ultimately liable.

(a) *The Oropesa*, [1943] P. p. 40, *per* Lord Wright.

standing the fact that it would not have been incurred but for the injury inflicted on him by the defendant. The same principle was applied in *Cutler v. United Dairies* (b), a case in which the plaintiff had deliberately run the risk of injury in giving assistance with a horse after it had bolted, though he was under no duty to take the risk. This is in effect but an application of the maxim *Volenti non fit injuria* (c).

35. *Contributory negligence of plaintiff*.—The liability of a defendant for consequences more directly due to the act of the plaintiff himself is further limited by the rule that the plaintiff must have acted with due care. If he has not shown due care, his claim is barred by the rule as to contributory negligence (d). The rule as to the contributory negligence of the plaintiff determines not merely whether the plaintiff has any cause of action at all, but also what damages he can recover for a cause of action proved to exist. The plaintiff cannot recover "for damage, which is really self-inflicted, because with reasonable effort he could have avoided it" (e).

36. *Novus actus where contractual duties*.—Liability for consequences caused by a *novus actus* in cases in which there is a contract depends upon the terms, express or implied, of that contract. Thus a bailee of goods is bound to use due care for their safety, and if for want of such care they are lost by theft, he cannot plead in defence that the immediate cause of their loss was an act of wilful wrongdoing on the part of the thief (f). So in *London Joint Stock Bank v. MacMillan* (g) it was held that a customer of a bank owes to the bank a contractual duty of care so to draw his cheques as not to facilitate an increase of the amount thereof by forgery. In *Re Polemis*, Scrutton, L.J., said: "Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence

(b) [1933] 2 K. B. 297. Cp. *Sylvester v. Chapman* (1935), 79 S. J. 777 (plaintiff mauled by leopard whilst inside barrier in endeavouring to extinguish cigarette end lying on straw at circus). Contrast *Haynes v. Harwood*, [1935] 1 K. B. 146 (where there was a moral duty), and see Goodhart in 5 Camb. L. J. 192 on the position of rescuers. *Supra*, s. 8 (5).

(c) [1933] 2 K. B. p. 303, *per* Scrutton, L.J.

(d) *Infra*, ss. 124-6.

(e) *Admiralty Commissioners v. S.S. Chekiang*, [1926] A. C. p. 646, *per* Lord Sumner. Cp. *Glover v. L. & S. W. Ry.* (1867), L. R. 3 Q. B. 25.

(f) *Goldman v. Hill*, [1919] 1 K. B. 443; *Doorman v. Jenkins* (1834), 2 A. & E. 256.

(g) [1918] A. C. 777. Cp. *De la Bère v. Pearson*, [1908] 1 K. B. 280. Contrast *Slingsby v. District Bank*, [1931] 2 K. B. 588; [1932] 1 K. B. 544.



that some one finding the cheque should commit forgery: while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled." The explanation seems to be that it is for the Court in each case to determine what terms to imply in a contract.

37. *Intervening failure to act.*—Different considerations will clearly apply where between the original fault and the subsequent damage there is a negligent failure to act. In general such cases will fall under the head of contributory negligence. Where there is no question of contributory negligence it is difficult to see how the chain of causation can be broken. It has been suggested, however, that "supine inaction" may be a *novus actus* (h). And a deliberate act of omission is certainly an *actus*. It is just the same in quality as an act of commission. It is a voluntary act (i). Further, where the defendant is entitled to rely upon some other person to guard against the dangerous situation which he has created and that other person fails in his duty, his failure may negative the existence of negligence in the defendant. An intervening conscious agency should have averted the mischief, and the defendant has not been guilty of breach of duty (k).

38. *Rule of remoteness excluded when property is at the wrongdoer's risk.*—The rule as to remoteness of damage has no application to those cases in which the defendant has wrongfully taken possession of or otherwise dealt with property in such a manner that it is now at his risk (l). In such a case he is responsible for any resulting loss, destruction, or damage of that property, however remote that consequence may be. The property is at his risk, and he must either return it or pay for it. Thus in *Hiort v. Bott* (m) the defendant wrongly delivered the plaintiff's goods to a third person to be taken back to the plaintiff, and was held responsible for their misappropriation by the person to whom he delivered them. So in *Lilley v. Doubleday* (n) a bailee, who ought by the terms of his contract to have kept the goods in one building, kept

(h) *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927), 138 L. T. p. 374, *per* Lord Dunedin, dissenting.

(i) *Harnett v. Bond*, [1924] 2 K. B. 517.

(k) *Buckner v. Ashby & Horner*, [1941] 1 K. B. 321.

(l) See Jeremiah Smith's comment on this passage, *Harvard Essays*, 686, n. 29.

(m) (1874), L. R. 9 Ex. 86. But *vide infra*, s. 72 (4), n. (r).

(n) (1881), 7 Q. B. D. 510. See also *Davis v. Garrett* (1830), 6 Bing. 716; *Bontex Knitting Works v. St. John's Garage* (1944), 60 T. L. R. 44, 253. Cp. Sale of Goods Act, 1893, s. 20.

them in another, which was burnt down; and he was held liable for the destruction of the goods, although the one building was as safe as the other. It is conceived that the same conclusion would have been reached if the goods had been stolen instead of burned.

39. *Comparison of rules as to remoteness in tort and contract.*—The rule as to remoteness of damage in actions based upon contract was laid down in the classic words of Alderson, B., in *Hadley v. Baxendale* (o): "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." These are the principles by which "the jury ought to be guided in estimating the damages arising out of any breach of contract". It has so often been said (p) that the rule as to remoteness of damage is the same whether the damages are claimed in actions of contract or tort that Evans, P., in *H.M.S. London* (q) called it "settled law". But there is also a body of authority which disputes the truth of so general a statement.

The commonest way of stating the law at present is to say that the measure of damages may be larger in contract than in tort, because in contract damages may be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort (r). In other words, the rule in *Re Polemis* is covered by the first branch of the rule in *Hadley v. Baxendale*, but the second branch of the rule in *Hadley v. Baxendale* has no application to the law of torts. On the other hand, some writers have thought

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(o) (1854), 9 Ex. pp. 354-5.

(p) Cp. *per* Brett, M.R., in *The Notting Hill* (1884), 9 P. D. p. 119; *East Suffolk Catchment Board v. Kent*, [1941] A. C. pp. 92-8, *per* Lord Atkin; Goodhart, 2 Toronto L. J. pp. 1 *sqq.*

(q) [1914] P. p. 77.

(r) *The Arpad*, [1934] P. p. 216, *per* Greer, L.J., cp. p. 232 (*per* Maugham, L.J.): *The Argentino* (1888), 13 P. D. p. 201, *per* Bowen, L.J.; *Cobb v. G. W. Ry.* (1893), 62 L. J. Q. B. p. 337, *per* Bowen, L.J.; *Weld-Blundell v. Stephens*, [1920] A. C. pp. 979-80, *per* Lord Sumner; *Re Hall and Pim's Arbitration* (1928), 139 L. T. p. 55, *per* Lord Phillimore; *The Edison*, [1932] P. p. 61, *per* Scrutton, L.J., p. 68, *per* Greer, L.J. See also *Sunley & Co. v. Cunard White Star*, [1940] 1 K. B. p. 748.

that damages can be recovered in tort which cannot be recovered in contract, and that the liability imposed by the rule in *Re Polemis* is wider than that imposed by the first branch of the rule in *Hadley v. Baxendale* (s). So Scrutton, L.J., said in *The Arpad* (t): "The real distinction is between a tort, the damages for which do not require notice to the wrongdoer of their probability, and contract, where *Hadley v. Baxendale* requires the consequences to be in the contemplation of the parties."

It is submitted that in spite of the strong body of authority to the contrary it is still the law, though not so settled as Evans, P., thought, that the rules as to remoteness are the same in contract and in tort. All direct consequences are to be regarded as "arising naturally" within the meaning of the first branch of the rule in *Hadley v. Baxendale* (u). In actions of tort there can of course be no question of consequences in the contemplation of the parties at the time of the making of the contract.

### § 35. Successive Actions on the same Facts

1. *All damages from same cause of action must be recovered in one action.*—More than one action will not lie on the same cause of action; therefore all damages resulting from the same cause of action must be recovered at one and the same time. The rule is designed to prevent the oppressive and vexatious litigation that might result if an injured person were at liberty to divide his claim and sue in successive actions for different portions of the loss sustained from a single cause of action.

Thus, in *Fitter v. Veal* (w) a plaintiff, after recovering damages for an assault and battery, discovered that his injuries were more serious than was at first supposed, and he found it necessary to submit to a surgical operation; whereupon he brought a second action for the additional damage. But it was held that he had only one cause of action, which had been wholly extinguished by the judgment recovered in the first action. On the same principle, judgment recovered during an injured person's lifetime is a bar

(s) *E.g.*, Beven, p. 108; McNair, 4 Camb. L. J. pp. 140-5; Mayne, *Damages* (10th ed.), p. 10; Winfield, p. 725. Cp. Scrutton, L.J., in *The Arpad*, [1934] P. p. 205 (dissenting).

(t) [1934] P. p. 205 (dissenting). Note that in *The Edison*, *supra*, n. (r), Scrutton, L.J., said that the liability in contract was wider.

(u) Cp. *Weld-Blundell v. Stephens*, [1920] A. C. p. 983, *per* Lord Sumner; *Vaile v. Hobson* (1933), 149 L. T. 283; and in particular the illuminating article by Porter (now Lord Porter) in 5 Camb. L. J., pp. 188-91.

(w) (1701), 12 Mod. 542; (*sub tit. Fetter v. Beale*) 1 Ld. Raym. 339, 692.

to a subsequent action by his representatives under the Fatal Accidents Act if he dies of the injury (x).

The application of this rule is not excluded or affected by the fact that when the first action was brought the damage in respect of which the second action is brought had not yet accrued, or was unknown to the plaintiff (y).

2. *But not when two causes of action.*—Where, however, there are two distinct causes of action, and not merely two distinct heads of damage, successive actions will lie in respect of each of them. This happens in the following classes of cases:—

- (a) When the same act amounts to a violation of two distinct rights;
- (b) When the defendant has committed two distinct acts, even though in violation of the same right;
- (c) When the cause of action is a continuing one.
- (d) (Probably) When the wrong is only actionable on proof of actual damage and it produces damage at different times.

3. *Violation of distinct rights.*—When the wrongful act of the defendant has violated two distinct rights vested in the plaintiff, a separate action will lie to recover the damage suffered in respect of each of these rights. Thus, in *Brunsdon v. Humphrey* (z) the plaintiff, a cabdriver, having already recovered compensation in the county court for damage done to his cab by a collision with the defendant's van, was held entitled by a majority of the Court of Appeal to bring a second action in the High Court in respect of personal injuries suffered by him in consequence of the same accident. So in *Guest v. Warren* (a) it was held that an action for malicious prosecution would lie, notwithstanding a previous action

(x) *Read v. Great E. Ry.* (1868), L. R. 3 Q. B. 555. See also *Hodson v. Stallebrass* (1840), 11 A. & E. 301 (loss of service); *Clarke v. Yorke* (1882), 47 L. T. 381 (fraudulent misrepresentation).

(y) *Fitter v. Veal* (1701), 12 Mod. 542; *Read v. Great E. Ry.* (1868), L. R. 3 Q. B. 555; *Derrick v. Williams*, [1939] 2 A. E. R. 559. See the strange result of this rule in *Townend v. Askern Coal Co.*, [1934] Ch. 463, where there was a trespass in 1927 and no damage by subsidence was caused until 1928, by which time that damage had been legalised. Had the plaintiffs taken proceedings in 1927 they could have recovered prospective damages for the subsidence, but as proceedings were not commenced until after the legalisation they were only able to recover damages for the results of the trespass prior to 1928.

(z) (1884), 14 Q. B. D. 141. This case, though open to review in the House of Lords, and though there was a great conflict of judicial opinion, has always been regarded as "of sound authority": *Derrick v. Williams*, *ubi supra*, p. 566. It was treated as establishing the law in *The Oropesa*, [1933] P. p. 35. Cf. *Johnson v. Garledge*, [1939] 3 A. E. R. 654.

(a) (1854), 9 Ex. 379. See also *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454.

in which damages had been recovered for a false imprisonment arising out of the same transaction. So again, a plaintiff who has already sued for damages in a personal capacity can subsequently bring another action for damages arising from the same wrongful act in a representative character (b).

To justify two actions, however, there must be two distinct rights violated; it is not enough that the same act amounts to two distinct violations of the same right. Thus, separate actions will not lie for two different personal injuries received from the same act of negligence or assault, as when the plaintiff has his leg broken and also his arm (c).

4. *Distinct wrongful acts.*—So also two actions will lie when the defendant has committed two distinct wrongful acts, even against the same person in violation of the same right. Thus, if he has on two different occasions entered upon the plaintiff's land, the plaintiff is not bound to sue for both these trespasses at once, but may bring separate actions for each of them. On the same principle, if the same libellous statement is published to two or more persons at different times, a separate action will lie for each publication (d).

5. *Successive actions for continuing injuries.*—When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued.

An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. So also a trespass by

(b) *Cp. Marginson v. Blackburn B. C.*, [1939] 2 K. B. 426; *Townsend v. Bishop* (1939), 160 L. T. 296.

(c) *Brunsdon v. Humphrey* (1884), 14 Q. B. D. at p. 148, *per* Bowen, L.J.; *Macdougall v. Knight* (1890), 25 Q. B. D. p. 8, *per* Lord Esher; *Clark v. Urquhart*, [1930] A. C. p. 54, *per* Lord Sumner; *Conquer v. Boot*, [1928] 2 K. B. 336.

(d) Any vexatious or oppressive exercise of this right of suing separately for a number of acts of the same kind will be restrained by the Court in the exercise of its discretionary power to prevent the abuse of legal process. *Brunsdon v. Humphrey* (1884), 14 Q. B. D. p. 151, *per* Bowen, L.J.; *Macdougall v. Knight* (1890), 25 Q. B. D. 1. And *vide infra*, s. 116 (3).

placing things wrongfully upon another's land continues until these things are removed (e).

6. *Prospective damages not recoverable.*—In the case of such a continuing injury an action may be brought during its continuance, but damages are recoverable only up to the time of their assessment in the action (f). Prospective damages for any further continuance of the injury are not recoverable by way of anticipation, for *non constat* that the defendant will not discontinue the wrong forthwith. This is so however permanent the source of the mischief may be, and however improbable it may be that the defendant will discontinue it: as when he has built a house which blocks the ancient lights of the plaintiff. There will be time enough to sue for future damage when it accrues (g).

Nor does it make any difference in this respect that the known probability of the future continuance of the injury has diminished the present saleable value of the property affected by it. This diminution of value does not amount to present and accrued damage which may be now recovered. Loss caused by the fear of a future injury is not itself a present injury for which damages can be recovered (h).

7. *Distinction between injuries actionable per se and those actionable only on proof of damage.*—If the continuing injury is actionable *per se*, as in the case of trespass, or if it is the cause of fresh damage from day to day, as in the case of an obstruction of ancient lights, successive actions will lie *de die in diem* until the defendant chooses to relieve himself from this burden of litigation by discontinuing his wrong. If, on the other hand, a continuing injury is of a kind which is actionable only on proof of actual damage, and the damage caused is intermittent, as in the case of withdrawal of support, a new action will lie only when some new damage accrues.

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(e) *Bowyer v. Cook* (1847), 4 C. B. 286; *Konskier v. Goodman*, [1928] 1 K. B. 421.

(f) Order XXXVI, r. 58: "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." See *Hole v. Chard Union*, [1894] 1 Ch. 293.

(g) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127.

(h) *West Leigh Colliery Co. v. Tunncliffe & Hampson, Ltd.*, [1908] A. C. 27. This case and that of the *Darley Main Colliery Co.* sufficiently illustrate the undoubted rule as to the measure of damages in continuing injuries. It is, however, a matter of some doubt whether the withdrawal of support is really a true case of continuing injury at all, and whether the possibility of successive actions for successive subsidences is not rather to be explained on a different principle. *Vide infra*, s. 35 (10), and s. 60.

8. *Accrual of title after commencement of injury.*—A continuing injury to property is actionable at the suit of a plaintiff whose title did not accrue until after the commencement of the injury, and such a plaintiff may recover damages in respect of the continuance of the act since the accrual of his title. Thus, he who buys land may sue for a continuing trespass or nuisance which existed at the time of his purchase (i).

9. *Damages in lieu of injunction include future damage.*—Notwithstanding the foregoing rules as to the measure of damages in continuing injuries, when an action is brought for an injunction against such an injury, and damages are given in substitution for an injunction in pursuance of the Court's discretionary powers in that behalf, such damages are given in full satisfaction for all future damage which may arise from a continuance of the injury complained of, and therefore no subsequent action will lie in respect thereof. By Lord Cairns' Act, 1858, s. 2, discretionary jurisdiction was conferred upon the Court of Chancery, in all cases in which it had power to grant an injunction, to award damages "either in addition to or in substitution for such injunction". Although this Act is now repealed, the jurisdiction so created is still retained under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 37. Damages so given in substitution for an injunction have reference to the future, and not to the past merely, and they therefore amount to the legalisation of the further continuance of the act complained of—a purchase by the defendant of the right to go on doing it (j).

10. *Successive actions for wrongs actionable only on proof of damage.*—Where the act of the defendant is actionable *per se*, there is no doubt, as we have seen (k), that all damage, both actual and prospective, may and must be recovered in one action. But where the act of the defendant is not actionable *per se*, but is actionable only if it produces actual damage, and it produces damage twice at different times, is there one cause of action, or are there two? If, for example, the defendant by an act of negligence has created a source of danger which on two successive occasions causes personal harm to the plaintiff, is the plaintiff barred from recovery for the second harm because he has already recovered damages or accepted

(i) *Hudson v. Nicholson* (1839), 5 M. & W. 437; *Konskier v. Goodman*, [1928] 1 K. B. 421.

(j) *Leeds Industrial Co-operative Society v. Slack*, [1924] A. C. pp. 860-1, 871-2. *Vide infra*, s. 36 (7).

(k) *Supra*, s. 36 (1).

compensation for the first? From what date in each case does the Statute of Limitations commence to run—from the date of the first damage as to the entire claim or separately from the respective dates of each damage? On principle it would seem that in such cases each head of damage constitutes a distinct cause of action, but the law on this point cannot be regarded as finally settled (*l*). In *Darley Main Colliery Co. v. Mitchell* (*m*) it was held that successive subsidences of land, due to the same act of excavation, constituted distinct causes of action for which successive actions would lie. Lord Bramwell bases his opinion in this case expressly on the ground that where an act is not actionable without proof of actual damage, the rule that all damage resulting from the same act must be recovered in the same action does not apply (*n*). This case is, however, capable of another interpretation: the withdrawal of support may be regarded as a continuing injury actionable from time to time as new damage from time to time accrues from it. This was the view taken of the case by Bowen, L.J., in the Court of Appeal (*o*). There are, however, serious difficulties involved in this explanation. As pointed out by Lord Blackburn in his dissenting judgment (*p*), if the withdrawal of support is a continuing injury, the occupier for the time being of land on which an excavation has been made by his predecessor in title must be liable, as in the case of any other continuing nuisance, for any subsidence which occurs during his period of occupancy. This, however, has been held in two cases not to be so (*q*). It would seem to follow that the withdrawal of support is not a continuing injury, and that *Darley Main Colliery Co. v. Mitchell* is authority for the rule that, when an act is actionable only on proof of actual damage, successive actions will lie for each successive and distinct accrual of damage.

But where the damage sued for in the second action is not in reality distinct from that sued for in the first, but is merely a part of it or consequential upon it, it cannot be recovered. For it is clear that the second damage in order to be recoverable in a second action must arise directly from the wrongful act of the defendant

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(*l*) Sir John Salmond dealt with this matter at greater length, and showed the anomalous results of the opposite conclusion. See 7th ed., s. 37 (10). The opposite view is taken in Cl. & L. 178.

(*m*) (1886), 11 App. Cas. 127.

(*n*) *Ibid.* p. 145. Cp. Lord Halsbury at pp. 132–3; Lord Fitzgerald at p. 151.

(*o*) 14 Q. B. D. p. 138.

(*p*) Cp. Lord Blackburn (dissenting) in the *Darley Main Case*, 11 App. Cas. p. 144.

(*q*) *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165 (Bruce, J.); *Hall v. Duke of Norfolk*, [1900] 2 Ch. 493 (Kekewich, J.). *Infra*, s. 60.



and not indirectly through the damage already sued for. In other words, compensation for the first damage includes compensation for all the ulterior consequences of that damage whether already accrued or not, but it does not include compensation for entirely distinct damage accruing from the defendant's act independently of the damage first sued for (r) (s).

11. *Accord and satisfaction*.—The operation of accord and satisfaction in barring a subsequent action for further damages is the same as that of a judgment in a prior action, unless it is proved that the intention of the parties was the contrary. An accord and satisfaction is a destruction of the cause of action, just as a judgment is, and therefore it is equally a bar to any later action founded on the same cause of action, even though for further damage. Thus, in *Read v. Great Eastern Ry.* (t) a person injured by the negligence of a railway company received compensation from them in his lifetime, but subsequently died of his injuries; and it was held that his executors had no cause of action under the Fatal Accidents Act.

Yet if it can be shown that the real agreement between the parties was not to destroy the whole cause of action, but merely to pay and receive compensation for the damage accrued up to that time, that agreement will be effective, and an action will lie for any further damage (u).

## § 36. Injunctions

1. *Prohibitory and mandatory injunctions*.—Injunctions are of two kinds, being either prohibitory or mandatory. A prohibitory injunction is an order restraining the defendant from committing or repeating an injurious act—for example, a trespass to land or the erection of a building which would obstruct the plaintiff's lights. A mandatory injunction is an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise in fulfilment of his legal obligations—for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights.

(r) *Supra*, s. 35 (1).

(s) As to the possibility of successive actions for slander in respect of different heads of damage, see *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. p. 145, *per* Lord Bramwell, and p. 143, *per* Lord Blackburn, and *dicta* cited in 9th ed., s. 35 (10), n. (p).

(t) (1868), L. R. 3 Q. B. 555.

(u) *Prosser v. Lancashire & Yorkshire Accident Insurance Co.* (1890), 6 T. L. R. 285; *Ellen v. G. N. Ry.* (1901), 49 W. R. 595.

2. *Interlocutory and perpetual injunctions.* — Injunctions, whether prohibitory or mandatory, are either interlocutory or perpetual. An interlocutory injunction is one issued provisionally before the hearing of the action, in order to prevent the commission or continuance of an alleged injury in the meantime, pending an inquiry into the case and a final determination of the right of the plaintiff to a perpetual injunction. A perpetual injunction, on the other hand, is one issued after the hearing and determination of the question at issue between the parties.

3. Injunctions are either (1) against the *continuance* of an injury, (2) against the *repetition* of one, or (3) against the *commission* of one. The commonest and most important case is the first of these; an injunction is the ordinary and most effective remedy in all cases of continuing wrongs—for example, a nuisance or the infringement of a right of light. Even when the injury is not continuing, however, an injunction may be granted if there is any sufficient reason to believe that it will be repeated—for example, a trespass under a claim to a right of way.

*Quia timet actions.*—In the third place, even if no complete injury or cause of action for damages yet exists, an injunction may be obtained in a *quia timet* action to prevent the commission of an injury in the future; as when the defendant threatens or intends to erect a building which will obstruct the plaintiff's lights, or to establish a fever hospital which will be a dangerous nuisance to the plaintiff's premises. "Preventing Justice excelleth punishing Justice", said Lord Coke (w). "Prevention is better than cure" (x).

In all cases, however, it seems necessary that there shall be a sufficient degree of probability that the injury will be substantial and will be continued, repeated, or committed at no remote period (y). "A mere vague apprehension is not sufficient to support an action for a *quia timet* injunction. There must be an immediate threat to do something" (z). And "in a purely *quia timet* action the burden of proof resting on the plaintiff is far heavier than in an action

(w) 2 Inst., p. 299.

(x) *Re Anderson-Berry*, [1928] Ch. p. 307, per Sargant, L.J.

(y) *Litchfield-Speer v. Queen Anne's Gate Syndicate*, [1919] 1 Ch. 407. Cp. *Att.-Gen. v. Manchester Corporation*, [1893] 2 Ch. p. 92. See also *Att.-Gen. v. Nottingham Corporation*, [1904] 1 Ch. 673; *Medcalf v. Straxbridge, Ltd.*, [1937] 2 K. B. 102.

(z) *Graigola Merthyr Co. v. Swansea Corporation*, [1929] A. C. p. 353, per Lord Buckmaster.

where an act has already been done and has already caused actual damage" (a).

4. *No injunction if obedience impracticable.*—No injunction will be granted in a case where obedience to such an order is impracticable. "The Court will never enjoin a defendant, unless it is satisfied that the party enjoined can obey the order" (b). For there are cases in which a defendant is liable in law for the continuance of a wrongful state of things, and yet has no power to put an end to it; and in such cases the plaintiff's only remedy is damages.

5. *Jurisdiction to issue injunctions.*—Originally injunctions were issued only by the Court of Chancery. Now, however, by the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting provisions of the Judicature Act, 1873, all Divisions of the High Court have power in respect of all kinds of injuries (d) to issue injunctions, whether prohibitory or mandatory, interlocutory or perpetual, whenever "it shall appear to the Court to be just or convenient that such order should be made". Moreover, by Lord Cairns' Act (e) the Court has jurisdiction, in all cases in which it might grant an injunction, to award damages "either in addition to or in substitution for such injunction".

6. *Jurisdiction discretionary, but injunction granted as of course, save in exceptional cases.*—The jurisdiction thus conferred upon the High Court to issue injunctions is discretionary. A claim for damages is a claim of right, but a claim for an injunction may be granted or refused by the Court in the exercise of its judicial discretion. The general principle, however, in accordance with which this judicial discretion must be exercised is that an injunction should be granted in all cases of continuing or threatened injury, unless in the particular instance there is some special reason why it should be refused. In other words, an injunction, though not a matter of right, is a matter of course, unless the Court in the exercise of its judicial discretion and on special grounds considers that this remedy would not be just or convenient (f).

(a) *Graigola Merthyr Co. v. Swansea Corporation*, [1928] Ch. p. 244.

(b) *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. p. 220.

(d) Including even libel. But as to interlocutory injunctions in cases of libel, see *Bonnard v. Perryman*, [1891] 2 Ch. 269.

(e) S. 2. See *supra*, s. 35 (9).

(f) Cp. *Lord Kingsdown in Imperial Gas Light Co. v. Broadbent* (1859), 7 H. L. C. p. 612. See *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. p. 310, *per* Lord Halsbury.

7. *Jurisdiction to grant damages in lieu of injunction.*—The discretion of the Court to depart from this general rule of restraining an injury by injunction, and to compel a plaintiff to accept pecuniary satisfaction for his wrongs, is unfettered. But in the leading case of *Shelfer v. City of London Electric Lighting Co. (g)*, Lindley, L.J., said: "Ever since Lord Cairns' Act, the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. . . . Such jurisdiction ought not to be exercised except under very exceptional circumstances". But the tendency now seems to be towards exercising more freely the discretion to award damages, so that in *Fishenden v. Higgs and Hill (h)* Lord Hanworth, M.R., said: "We ought to incline against an injunction if possible".

8. The necessity of this power of refusing an injunction in special cases in the exercise of a judicial discretion is due to the fact that the remedy of injunction, if granted in all cases as a matter of right, could be used by plaintiffs as an instrument of unjust oppression, with the most mischievous results both to individual litigants (i) and to the public. "Incautiously awarded such injunctions may impede, may, indeed, entirely arrest properly progressive schemes of building development with consequences as injurious ultimately to the community as they are throughout oppressive to a defendant" (k). It is notorious, for example, that the facility with which injunctions have in the past been granted to prevent the obstruction of ancient lights has led to the rise of a class of plaintiffs whose sole object is extortion, and who by a threat of preventing building operations by injunction exact sums of money greatly in excess of any loss which they sustain. A recognition of this and similar evils has resulted at the present day in greater willingness

(g) [1895] 1 Ch. pp. 815, 816

(h) (1935), 153 L. T. 128, p. 139. Cp. *infra*, s. 36 (8) and n. (l).

(i) So in *United Fruit Co. v. Leyland & Co.* (1980), 144 L. T. 97, it was held that an interim injunction should not be granted to restrain the conversion of perishable goods (bananas): such an order might have the result of keeping perishable goods in *statu quo* until the hearing of the case, when they might be not perishable goods, but completely perished goods.

(k) *Slack v. Leeds Industrial Co-operative Society*, [1928] 1 Ch. p. 461, per Younger, L.J.

on the part of the Courts to award damages instead of granting injunctions (l).

9. *When an injunction will be refused.*—Since the refusal of an injunction is a matter of judicial discretion, no hard-and-fast rules can be laid down on the point; but we may say that there are at least two matters which will be taken into consideration by the Court—namely, (1) the magnitude of the injury complained of, and (2) the conduct of the parties (m).

*Injury too trifling.*—The fact that the acts complained of are already finished (n) or that the damage done or apprehended is so small that pecuniary compensation will be a just and adequate remedy, and an injunction will be needlessly oppressive, may be deemed in the discretion of the Court a sufficient reason for refusing this latter remedy (o).

On this principle, in *Kine v. Jolly* (p) the Court of Appeal refused a mandatory injunction to pull down a dwelling-house obstructing the light of the adjoining dwelling-house, although the damage was estimated at £800. On the same principle injunctions have been refused in the case of merely temporary or intermittent nuisances (q), and in the case of repeated trespasses committed under a claim of right but causing no damage (r), and in cases where the interest of the plaintiff in the property affected was about to determine (s).

How small the injury must be in order to exclude the remedy of injunction as unduly oppressive, in accordance with this rule, is a question to which no definite reply can be given. In the absence of any wilful or insolent disregard of the plaintiff's rights, the Courts tend to show themselves more inclined than formerly to hold an injury to be too trivial to justify the use of the formidable weapon of injunction (t).

(l) See the observations of Lord Macnaghten and Lord Lindley in *Colls v. Home & Colonial Stores*, [1904] A. C. pp. 193, 212, and references in 9th ed., s. 36 (8), n. (h).

(m) *Fishenden v. Higgs and Hill* (1935), 153 L. T. 128.

(n) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. p. 317, *per* Lindley, L.J.

(o) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. p. 322, *per* Smith, L.J. *Cp. Colls v. Home & Colonial Stores*, [1904] A. C. p. 212, *per* Lord Lindley.

(p) [1905] 1 Ch. 480.

(q) *Swaine v. Gt. N. Ry.* (1864), 4 De G. J. & S. 211.

(r) *Behrens v. Richards*, [1905] 2 Ch. 614.

(s) *Jacomb v. Knight* (1863), 3 De G. J. & S. 533.

(t) See note (l), *supra*.

10. *Conduct of the parties.*—A second matter to be taken into account in the exercise of the Court's discretion to refuse an injunction is the conduct of the parties. If the plaintiff has acted in such a way as to render it unjust that he should obtain the benefit of this discretionary remedy, he will be left to his bare legal right of damages. "An injunction should only be awarded to those whose conduct entitles them to the interference of a Court of equity" (u). Thus, if a plaintiff has knowingly stood by and made no objection while the defendant has in ignorance invaded his rights (as by erecting a building which obstructs an easement of light or a right of way), no injunction will be granted to him (w).

Conversely, if the defendant has himself acted with wilful and high-handed disregard of the plaintiff's rights, an injunction will be granted even in cases which would otherwise have been deemed too trivial for this remedy (x).

11. *Effect of injunction on interests of defendant or of the public.*—When, on the other hand, the damage done or apprehended is substantial, and there is nothing in the conduct of the plaintiff sufficient to render him undeserving of this remedy, an injunction will be granted even though its effect will be to inflict upon the defendant or upon the public at large a loss that is much greater than any benefit so conferred upon the plaintiff. The Court will not sanction, in the interest of individuals or of the public, any substantial invasion of private rights, even on the terms of paying full compensation for the injury so inflicted. So Lord Sumner, dissenting, doubted (y) "whether it is complete justice to allow the big man, with his big building and his enhanced rateable value and his improvement of the neighbourhood, to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for". "Neither", says Lindley, L.J., in *Shelfer's Case* (z), "has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose

(u) *Jordeson v. Sutton Gas Co.*, [1899] 2 Ch. p. 260.

(w) *Duke of Leeds v. Earl of Amherst* (1846), 2 Ph. p. 123; *Gaskin v. Balls* (1879), 13 Ch. D. 324. Mere delay, however, is no bar to a final injunction, if the defendant has not been thereby misled into altering his position. *Fullwood v. Fullwood* (1878), 9 Ch. D. 176.

(x) *Colls v. Home & Colonial Stores*, [1904] A. C. p. 198, per Lord Macnaghten. See *Horton's Estate v. Beattie*, [1927] 1 Ch. 75; *Price v. Hilditch*, [1930] 1 Ch. p. 510.

(y) *Leeds Industrial Co-operative Society v. Slack*, [1924] A. C. p. 872.

(z) [1895] 1 Ch. p. 316.

rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it."

Thus, injunctions have been granted prohibiting the use of electric-lighting machinery which was causing structural injury and discomfort in a public-house (a); prohibiting the making of coal-gas to the injury of the plaintiff's vegetable garden (b); prohibiting the discharge of the sewage of a town into a river to the injury of the plaintiff's fishing rights therein (c); ordering a building to be pulled down which obstructed the windows of an adjoining building (d); ordering the removal of great quantities of stones and ballast that had been wrongfully deposited upon the plaintiff's oyster beds (e) (f).

12. *Damages in lieu of injunction granted in respect of future damage.*—When damages are awarded in substitution for an injunction in pursuance of the discretionary jurisdiction conferred by Lord Cairns' Act, such damages are given in respect of the future, and not merely, as at common law, in respect of damage already done in the past. Such an award of damages amounts, therefore, to a legalisation of the apprehended mischief; the defendant has thereby purchased a right to do the act in respect of which an injunction was asked, and in respect of which damages have been given instead.

There are, therefore, four alternative courses open to the Court in such cases:—

- (a) To give damages for the past and an injunction for the future;
- (b) To give damages for the past and refuse any relief as to the future, thus leaving the plaintiff free to bring a second action for further damage when it accrues;
- (c) To give damages for the past and also damages in respect of the future in lieu of an injunction, thus finally disposing

(a) *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.

(b) *Imperial Gas Light Co. v. Broadbent* (1859), 7 H. L. C. 601.

(c) *Att.-Gen. v. Borough of Birmingham* (1858), 4 K. & J. 528.

(d) *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438; *Daniel v. Ferguson*, [1891] 2 Ch. 27; *Achilli v. Tovell*, [1927] 2 Ch. 243.

(e) *Woodhouse v. Newry Navigation Co.*, [1898] 1 Ir. R. 161.

(f) Nevertheless, although an injunction is granted, its operation may in cases where it would do injury to the defendant out of all proportion to the benefit of the plaintiff be suspended in order to give the defendant an opportunity of making provision for the purpose of minimising his loss. See, for example, *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

of the matter, and legalising the continuance of the injurious state of things (g).

- (d) To give damages in respect of the future alone in lieu of an injunction, thus finally disposing of the matter, and legalising the continuance of the injurious state of things.

Some unfortunate dicta in 1889 (h), by which the Court of Appeal considered itself bound, led a majority of that Court in 1923 to hold that there is no power to award damages in lieu of an injunction in a *quia timet* action, where no actual harm or complete cause of action for damages already exists (i). Happily (k) the House of Lords, also by a bare majority, reversed that decision in *Leeds Industrial Co-operative Society v. Slack* (l), and refused to put what Lord Finlay described as "a purely arbitrary and meaningless restriction on the relief to be given" under Lord Cairns' Act.

### § 37. The Limitation of Actions

1. *Six years' limitation the general rule in tort.*—The Limitation Act, 1939, simplified the law relating to the limitation of actions for tort (m). By that Act (n) no action founded on tort shall be brought after the expiration of six years from the date on which the cause of action accrued. There are, however, a few exceptional cases for which a shorter period of limitation has been prescribed by that Act or by statutes which still remain in force. We shall deal with them later.

2. *When the time begins to run.*—The period of limitation begins to run at the time when the cause of action accrued, i.e., "the earliest time at which an action could be brought" (o). Therefore, when a wrongful act is actionable *per se* without proof of actual damage, the statute runs from the time at which the act was committed—for example, libel, assault, or trespass to land or

(g) *Supra*, s. 35 (9).

(h) *Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. p. 333.

(i) *Slack v. Leeds Industrial Co-operative Society*, [1923] 1 Ch. 431.

(k) In spite of a cogent dissenting judgment by Lord Sumner. See Winfield, p. 170; Hanbury, Equity, pp. 82-3, 470-1.

(l) [1924] A. C. 851. Cf. *Peech v. Best*, [1931] 1 K. B. 1.

(m) For the earlier law see previous editions of this book, and in particular the Fifth Interim Report of the Law Revision Committee (Cmd. 5334).

(n) S. 2 (1) (a). The Act must be pleaded; the Court will not of its own motion take notice that the action is out of time: *Dismore v. Milton* (1938), 159 L. T. 381 (a case on the Limitation Act, 1623).

(o) *Reeves v. Butcher*, [1891] 1 Q. B. p. 511, *per* Lindley, L.J. See Cmd. 5334, ss. 6, 7.



goods. This is so even though the resulting damage does not happen or is not discovered until a later date; for such damage is not a new cause of action, but merely an incident of the old one (*p*). When, on the other hand, the wrong is not actionable without actual damage, the period of limitation does not begin to run until that damage happens: as in the case of negligence, fraud, or wrongful interference with an easement of support (*q*).

3. *Continuing injuries*.—When the injury is a continuing one—for example, a nuisance—a new cause of action arises *de die in diem* or as often as fresh damage accrues; and therefore an action will always lie in respect of any continuance of the wrong, or any accrual of fresh damage, which is not more than six years old. Thus, when a continuing nuisance has lasted for ten years, an action will lie for damages for its continuance during the last six years, although any claim for damages for the first four years is barred by the statute (*r*).

With the innovations in the law made by the Limitation Act, 1939, in connection with actions of conversion and detinue we shall deal when treating of those torts (*s*).

4. *No person capable of suing or being sued*.—Even when a cause of action is otherwise complete, it may be that there is not yet in existence any person who is capable of instituting the action, or any defendant capable of being sued; and in such case the statute does not begin to run until this bar to the institution of an action has disappeared. Thus, if a tort is committed against the estate of an intestate in the interval between his death and the grant of letters of administration, the statute does not begin to run until an administrator is appointed (*t*). Similarly, the statute does not begin to run in favour of a foreign ambassador until the termination of his period of office; for until then no action will lie against him (*u*). If, however, a complete and available cause of action has once come into existence, no subsequent and temporary bar to the institution of an action—for example, the death of either

(*p*) *Roberts v. Read* (1812), 16 East 215; *Howell v. Young* (1826), 5 B. & C. 259; *Hughes v. Twisden* (1886), 55 L. J. Ch. 481.

(*q*) *Roberts v. Read* (1812), 16 East 215; *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718; *Backhouse v. Bonomi* (1861), 9 H. L. C. 503. As to the period of limitation when distinct damage results at different times from the same wrongful act, see s. 35 (10), *supra*.

(*r*) *Hardy v. Ryle* (1829), 9 B. & C. 603; *Harrington (Earl of) v. Derby Corporation*, [1905] 1 Ch. 205, 226.

(*s*) *Infra*, s. 78.

(*t*) *Murray v. East India Co.* (1821), 4 E. & Ald. 204.

(*u*) *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352.

party intestate—has any effect in suspending the running of the statute (*w*).

5. *Disability of plaintiff*.—If when a right of action accrued the person to whom it accrued was under a disability, the period of limitation does not begin to run until six years from the date when he ceased to be under a disability or died, whichever event first occurred (*x*). A person is deemed to be under a disability while he is an infant, or of unsound mind, or a convict subject to the operation of the Forfeiture Act, 1870, for whom no administrator or curator has been appointed (*y*). A person is conclusively presumed to be of unsound mind if he is detained under any Act authorising the detention of persons of unsound mind or mental deficient (*z*). These disabilities must exist at the time when the cause of action first arises. If the statute has once commenced to run, the subsequent insanity of the plaintiff or the fact that the claim has passed to a person under a disability (*a*) will not have any effect (*b*). Where a person is under successive disabilities, *e.g.*, insanity supervening on infancy, time does not run against him until the last of the disabilities has come to an end provided that there is no interval between any of the disabilities (*c*). But, where a right of action which has accrued to a person under a disability accrues on his death to another person under a disability, no further extension of time is allowed (*d*).

6. *Undiscovered fraud and mistake*.—Where the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or the right of action is concealed by the fraud of any such person, or the action is for relief from the consequences of a mistake, time does not run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it. But the *bona fide* purchaser of property for valuable consideration is not to be prejudiced by this provision (*e*). And in all other cases the statute runs from

(*w*) *Rhodes v. Smethurst* (1840), 6 M. & W. 351.

(*x*) Limitation Act, 1939, s. 22. See Cmd. 5334, ss. 14—16.

(*y*) Limitation Act, 1939, s. 31 (2).

(*z*) *Ibid.*, s. 31 (3). This sub-section removed the hardship created by the decision in *Harnett v. Fisher*, [1927] A. C. 573. See 9th ed., s. 37 (5), n. (*m*).

(*a*) *Ibid.*, s. 22 (*a*).

(*b*) *Rhodes v. Smethurst* (1840), 6 M. & W. 351; *Garner v. Wingrove*, [1905] 2 Ch. 233.

(*c*) *Borrows v. Ellison* (1871), L. R. 6 Ex. 128.

(*d*) Limitation Act, 1939, s. 22 (*b*).

\* (*e*) Limitation Act, 1939, s. 26, settling several doubts, see 9th ed., s. 37 (6), and Cmd. 5334, s. 22.

the time when the cause of action first arises, and it makes no difference whether the cause of action was or was not known to the plaintiff, or whether it was or was not discoverable by him (f). In the expression "the rule of concealed fraud", as it used to be called, *fraud* is used in its widest sense as meaning any act of wilful and conscious furtive wrongdoing—for example, a wilful underground trespass and abstraction of minerals. The term *concealed*, moreover, does not imply any active suppression of the facts by the defendant, but means merely that the fraud is unknown to the person injured at the time of its commission (g). The provision as to mistake was an alteration in the law made by the Limitation Act, 1939 (h).

### § 38. Special Periods of Limitation

1. The general limitation of six years established by the Limitation Act, 1939, is cut down in a few special cases.

2. *Public authorities*.—By section 21 of the Limitation Act, 1939, it is provided that "no action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued". But in the case of a continuing act, neglect or default, no cause of action is to be deemed to have accrued until the act, neglect or default has ceased. This section in substance reproduced the Public Authorities Protection Act, 1893 (i). There were, however, two changes introduced by the 1939 Act. In the first place, the time within which the action might be brought was extended from six months to one year. In the second place, under the 1893 Act the period of limitation ran from the date of "the act, neglect or default complained of, or, in the case of a continuance of injury or damage", from the ceasing thereof. This clause was very strictly construed and it might well be that in cases where the

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(f) *Short v. McCarthy* (1820), 3 B. & Ald. 626.

(g) *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Oelkers v. Ellis*, [1914] 2 K. B. 139; *Lynn v. Bamber*, [1930] 2 K. B. 72.

(h) See Cmd. 5334, s. 23.

(i) S. 1. See for a full discussion of that Act, C. S. Emden in 39 L. Q. R. 341. The protection extends to *quia timet* actions, and the time runs from the time when the immediate threat to do something is made: *Graigola Merthyr Co. v. Swansea Corporation*, [1929] A. C. 344.

cause of action was not complete until the damage had occurred, *e.g.*, in subsidence cases, a man had lost a cause of action before he had got it (*k*).

The Act of 1939 made this impossible by enacting that the date from which time runs is the accrual of the cause of action. But hard cases may still arise. Thus, in *Carey v. Bermondsey Borough Council* (*l*) the plaintiff was injured as a result of the defendants' negligence in leaving a projection in a road and brought an action after six months had passed from the time of the accident. The Court of Appeal held that the continuance of injury and damage under the 1893 Act meant the continuance of the act which caused the damage. The plaintiff, therefore, was out of time. The result would, it seems, have been the same even although the damage suffered was undiscoverable until the expiration of the period. This still seems to be the law under the 1939 Act (*m*). But an act of omission usually constitutes a continuing breach of duty until the omission is remedied, and, if damage is suffered the right of action is kept alive (*n*). And in the case of such a continuing injury, such as a nuisance, the plaintiff, although he must sue within one year after the ceasing of the injury, may in such an action recover compensation for all damage which has accrued within the ordinary period of *six years* before action brought (*o*).

There were two main problems which arose under the Public Authorities Protection Act, 1893. The Act applied to a definite class of persons and to a definite class of actions. What persons are protected? What acts are protected? The answers to these two questions, which still exist under the Act of 1939, depend upon decisions which were for the most part given under the 1893 Act.

8. *Who are Public Authorities?*—It is now to be regarded as “finally settled” (*p*) that, as indicated by the short title of the 1893 Act, “any person” is limited in this context to “public

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(*k*) *Huyton and Roby Gas Co. v. Liverpool Corporation*, [1926] 1 K. B. pp. 155, 156; *Freeborn v. Leeming*, [1926] 1 K. B. p. 164. See Cmd. 5334, s. 26.

(*l*) (1903), 20 T. L. R. 2. Cp. *Freeborn v. Leeming*, [1926] 1 K. B. 160 (a very hard case); *Copper Export Association v. Mersey Docks* (1932), 147 L. T. 320; *Morris v. Winter*, [1930] 1 K. B. 243.

(*m*) So Winfield, p. 708.

(*n*) *Huyton and Roby Gas Co. v. Liverpool Corporation*, [1926] 1 K. B. 146; *Drake v. Bedfordshire C. C.*, [1944] K. B. 620. Contrast *Rawlins v. Gillingham Corporation* (1932), 146 L. T. 486.

(*o*) *Att.-Gen. v. Lewes Corporation*, [1911] 2 Ch. 495; *Huyton and Roby Gas Co. v. Liverpool Corporation*, [1926] 1 K. B. 146.

(*p*) *Griffiths v. Smith*, [1941] A. C. p. 177, *per* Lord Simon, L.C.

authorities". "It is a 'Public Authorities Protection Act' and not a 'persons protection act'" (q). The Act does not protect persons who are not, in some sense, public authorities, even though they are acting under statutory powers. Though this principle is "finally settled", it is not easy to determine how many of the earlier cases are still authority. But some things are clear. The phrase "public authorities" is not confined to municipal corporations. There are many other bodies which perform statutory duties and exercise public functions, e.g., harbour boards acting without profit and River Commissioners (r), water boards (s), the Prison Commissioners (t), the Wheat Commission (u), the managers of non-provided schools (v), and so forth. The criterion seems to be, is the body carrying out transactions for private profit or working for the benefit of the public? A public authority may make profit for the public benefit (w), but a trading corporation making profits for its corporators cannot be a public authority (x). The mere fact that an undertaking is in the public interest is not enough in itself to make the body which carries it on a public authority. Thus the governors of a secondary school, constituted by a scheme under the Endowed Schools Act, 1869, are administering a charitable trust, but they are not a public authority (xx). So railway companies (y) or pier and harbour companies trading for their own profit (z) are not public authorities. The officers and servants of public authorities and persons acting under a direct mandate from them receive the same protection as the public authority itself (a). "It would be idle merely to protect the public authority itself if the party complaining could still bring an action against the actual person who committed the act complained of" (b). In *The*

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(q) *S.C.*, p. 205, per Lord Porter.

(r) *The Johannesburg*, [1907] P. 65.

(s) *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291.

(t) *Jacoby v. Prison Commissioners*, [1940] 2 A. E. R. 499; [1940] 3 A. E. R. 506 (defect in china chamber provided for use in furnished cell).

(u) *Paul, Ltd. v. Wheat Commission*, [1937] A. C. 139.

(v) *Griffiths v. Smith*, [1941] A. C. 170; *Greenwood v. Atherton*, [1939] 1 K. B. 388.

(w) *The Ydun*, [1899] P. 236; *Parker v. L. C. C.*, [1904] 2 K. B. 501; *Lyles v. Southend-on-Sea Corporation*, [1905] 2 K. B. 1; *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291.

(x) *The Johannesburg*, [1907] P. p. 80; *Griffiths v. Smith*, [1941] A. C. pp. 205-6.

(xx) *Woodward v. Mayor of Hastings* (1944), 171 L. T. p. 234; 172 L. T. 16, p. 17.

(y) *Swain v. Southern Ry.*, [1939] 2 K. B. 560.

(z) *Att.-Gen. v. Margate Pier and Harbour Proprietors*, [1900] 1 Ch. 749.

(a) *Griffiths v. Smith*, [1941] A. C. p. 186.

(b) *Nelson v. Cookson*, [1940] 1 K. B. 100, p. 103, per Atkinson, J.

*Danube II* (c) the protection given by the statute was accorded to a naval officer towing a battle target to Scapa Flow, who was acting under orders from the Crown, though the Crown itself was not liable to an action (d), and in *Nelson v. Cookson* (b) it was accorded to a medical officer performing an operation in a County Council hospital though the County Council would not have been liable for his negligence (e). He was exercising the authority as agent or delegate for or on behalf of the Council, who could not exercise it by their own hands. But the Act does not protect an independent contractor doing work under a contract with a public authority for his own profit, even if the public authority is liable for his acts (f).

4. *What acts are done in execution of a public authority?*—The second main question is: What kind of action by the public authority is an “act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority”? In one sense everything done by a public authority within the limits of its statutory powers might be regarded as done in execution of its public authority (g). But it was held in *Bradford Corporation v. Myers* (h) that only acts done in direct execution of a statute or in discharge of a public duty or in the exercise of a public authority are protected. In that case the corporation were bound to supply gas to the district and had statutory authority (which they were not bound to exercise) to sell the coke produced in the manufacture of the gas. They did so, and in delivering some coke to a purchaser his window was negligently damaged. It was held that the corporation were not entitled to the protection of the Act. The supplying of coke was not incidental to or part of their statutory obligation to supply gas (i). A breach of a contract which the public authority has a duty to make is clearly within the protection of the Act (k). But the word “authority” in the expression “in execution of a public authority” does not imply a

(c) [1921] P. 183. Salmond did not think the Act protected private persons, but see *Emden* in 39 L. Q. R. pp. 344–6, and *Polley v. Fordham* (1904), 72 J. P. 71.

(d) *Vide supra*, s. 10.

(e) *Vide supra*, s. 26 (5).

(f) As when he is working in a highway (*supra*, s. 31 (4)); *Tilling, Ltd. v. Dick, Kerr & Co.*, [1905] 1 K. B. 562; *Drake v. Bedfordshire C. C.*, [1944] K. B. p. 626, where the defendants were not working for their own profit.

(g) *Griffiths v. Smith*, [1941] A. C. p. 177.

(h) [1916] 1 A. C. 242, 247.

(i) As explained by Greene, M.R., in *Griffiths v. St. Clement's School*, [1939] 2 A. E. R. p. 83. See also *The Ronald West*, [1937] P. 212. *Sed quære?*

(k) *Compton v. West Ham B. C.*, [1939] Ch. 771.

positive obligation (l). "A private contract even if entered into in pursuance of an Act of Parliament is not thereby protected, but an act which is done in performance of a public duty is still done in the execution of a public duty, though it is performed through the medium of a contract" (m). It is difficult to lay down principles for determining on which side of the line an act falls, because it is a question the answer to which depends upon the true deduction from the facts (n). So in one case (o) it was held that the provision of an entertainment pavilion by a public authority was not covered by the Act; in another case (p) that the provision of a public swimming bath was. In *Griffiths v. Smith* (q) the managers of a non-provided elementary school invited a mother to attend an exhibition on the school premises of work done by the pupils (one of whom was her son). The floor collapsed and she was injured. It was held that the due carrying on of an educational establishment entails the holding of prize-giving ceremonies, of concerts and of exhibitions of the pupils' work and skill and that parents are rightfully invited to such entertainments (r). The managers were, therefore, entitled to the protection of the Act. It was left open what would have been the position if the school had at the time of the accident been used for a Sunday school, a bazaar or a political meeting (s).

The Act does not protect acts or defaults done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority. If they are done for other motives, they are done not in intended execution, but only in pretended execution of the duty. The burden of proof is on the plaintiff to prove the existence of such dishonest motives (t).

*Fatal accidents.*—If an accident results in the death of a person, an action against a public authority can be brought under the Fatal

(l) *Griffiths v. Smith*, [1941] A. C. p. 185. A "public duty", on the other hand, means a duty which can be legally enforced. The duty to prosecute for a criminal offence is not a public duty in this sense: *Martin v. L. C. C.* (1929), 28 Cox 618. Contrast *Betts v. Receiver for Metropolitan Police*, [1932] 2 K. B. 595.

(m) *Griffiths v. Smith*, [1941] A. C. p. 208, per Lord Porter.

(n) *Ibid.*

(o) *Hawkes v. Torquay Corporation*, [1938] 4 A. E. R. 16. Doubtful 5 Mod. L. R. 299.

(p) *Clarke v. Bethnal Green B. C.*, [1939] 2 A. E. R. 54.

(q) [1941] A. C. 170. See also *McManus v. Bowes*, [1938] 1 K. B. 98, 125.

(r) *Griffiths v. Smith*, [1941] A. C. p. 202, per Lord Porter.

(s) *S.C.*, at pp. 195, 204.

(t) *Scammell and Nephew v. Hurley*, [1929] 1 K. B. pp. 427-9, per Scrutton, L.J.

Accidents Act, 1846, within twelve months from his death, if he dies within one year of the accident, but if his death does not happen until after one year from the accident no action will lie (u).

*Disability.*—Under the Public Authorities Protection Act, 1898, no extension of time was allowed for the disability of the plaintiff. Under the Act of 1939 (w) the rule as to disability is the same as in other actions (x), except that if a plaintiff is an infant or of unsound mind no extension is allowed if at the time when the right of action accrued he was in the custody of a parent (xx).

5. *Collisions at sea.*—By the Maritime Conventions Act, 1911, a period of limitation of two years is imposed upon claims in respect of damage to a vessel or her cargo, or in respect of loss of life or personal injuries suffered by any person on board a vessel, caused by the fault of any other vessel (y). Under the same Act the period within which the owners of the vessels involved may enforce their right of contribution in cases of loss of life or personal injuries is one year from the date of payment (y). These periods may, however, be extended by the Court in certain circumstances (z).

6. *Statutory torts with special limitations.*—A third exception comprises all those miscellaneous cases in which a right of action in tort is conferred by a statute which also establishes for it a special period of limitation. Examples are the Law Reform (Miscellaneous Provisions) Act, 1934, conferring rights of action against executors, the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1925, and the Fatal Accidents Act, 1846. When a statute creates a new tort and imposes no period of limitation, the case falls within the general provisions of the Act of 1939 (a) (b).

(u) *Vide infra*, s. 92 (8).

(w) S. 22 (d).

(x) *Vide supra*, s. 37 (5).

(xx) See *Woodward v. Mayor of Hastings* (1944), 171 L. T. p. 233.

(y) Maritime Conventions Act, 1911, s. 8. Six months for the King's ships. *The Danube II*, [1921] P. 183.

(z) See Cmd. 5334, s. 29.

(a) *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718. This case decides that the two years period of limitation provided by the Civil Procedure Act, 1833, for "actions for penalties, damages, or sums of money given by any statute" applies only to penal actions, and not to statutory torts for which the remedy is an action for damages. Cp. actions brought by personal representatives under the Law Reform (Miscellaneous Provisions) Act, 1934, *supra*, s. 20 (7).

(b) As to the effect of the Statutes of Limitation upon the title to chattels, see Chapter IX. As to the law of prescription as a defence to an action for nuisance, see Chapter VIII. The operation of the Statutes of Limitation upon the title to land belongs to the law of property, and not to that of torts.



## § 39. Felonious Torts

1. *No action for felonious tort until felon prosecuted.*—When a tort is also a felony, no action can be brought in respect of the tort until the defendant has been prosecuted for the felony (c). “It is a well-established rule of law”, said Phillimore, L.J., in *Smith v. Selwyn* (d), “that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted.” “Whatever the old law may have been”, said Lord Wright (e), “the modern law is quite clear that if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended.” The rule is designed in the interests of public justice, for it compels persons injured by felonies to fulfil their duty of prosecuting the offender, instead of contenting themselves with the enforcement of their private rights. But the rule is an anachronism now that the police prosecute or are assumed to prosecute in every case of probable felony (f).

2. If the defendant in an action of tort wishes to raise the objection that the wrong complained of amounts to a felony, the proper procedure is not to raise this as a defence in the pleadings, but to make an application to the Court to stay the action (g).

3. *Exceptions to general rule.*—The rule has no application unless the person sued for the tort is the felon himself. If he is a third person innocent of any felony, although civilly responsible for the tort, an action will lie against him, whether the felon has been prosecuted or not. Thus, an action will lie against a master in respect of a felonious tort committed by his servant in the course of his employment (h). So the innocent receiver of stolen goods may be sued in trover although the thief has not been prosecuted (i). The rule does not apply to actions brought under the Fatal Accidents Act, 1846, even though the killing of the deceased amounted to murder or manslaughter. This Act expressly provides that the

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(c) *Smith v. Selwyn*, [1914] 3 K. B. 98.

(d) *Ibid.* p. 106.

(e) *Rose v. Ford*, [1937] A. C. p. 846.

(f) *S.C.*, p. 847, *per* Lord Wright.

(g) *Smith v. Selwyn*, [1914] 3 K. B. p. 106. But, since the rule is founded on public policy, it would seem that, once it appears that the cause of action is founded on a felony, the Judge himself should stay the action and not allow the trial to proceed. For the history of the rule, see Holdsworth, *H. E. L.*, iii, 331–3.

(h) *Osborn v. Gillett* (1873), *L. R.* 8 Ex. 88.

(i) *White v. Spettigue* (1845), 13 M. & W. 608; *Marsh v. Keating* (1834), 2 Cl. & F. 250.

action will lie "although the death shall have been caused under such circumstances as amount in law to felony" (k).

4. The rule has no application unless the plaintiff in the action of tort is the person who was injured by the felony, and whose duty it therefore is to institute a prosecution. Thus, if the person injured becomes bankrupt, his right of action may pass to his trustee, but it is not accompanied by the duty of prosecuting, and therefore the trustee's right of action is not suspended (l).

5. The rule does not apply if the prosecution of the offender has become impossible notwithstanding due diligence on the part of the person whose duty it was to prosecute—as, for example, when the offender has died or escaped from the jurisdiction before there has been any undue delay in commencing a prosecution (m), or, presumably, if there is any other reasonable justification of the failure to prosecute (n).

6. The rule applies only to felonies, not to mere misdemeanours or criminal offences punishable only on summary conviction (o).

#### §. 40. Assignment of Rights of Action for Torts

1. *Right of action for tort not assignable.*—The assignment of a right of action for damages for a tort is in general illegal and void (p). The rule is based on considerations of public policy, and is designed to prevent the oppressive litigation that would result if a right of action for damages were recognised as a marketable commodity capable of purchase by way of a commercial speculation. The purchase of a right of action for a tort is, indeed, merely a particular form of the offence of maintenance—the act of assisting and promoting without lawful justification the litigation of others (q).

2. The rule applies to torts of all kinds, whether they are injuries to property or to the person or otherwise, and the suggestion which has sometimes been made that injuries to property are an exception seems not maintainable (r).

(k) For the rule that no action can be brought for a felony resulting in the death of a human being, *vide infra*, s. 92, and see Holdsworth, H. E. L., iii, 383-5.

(l) *Ex p. Ball* (1879), 10 Ch. D. 667.

(m) *Marsh v. Keating* (1834), 2 Cl. & F. 250; *Ex p. Ball* (1879), 10 Ch. D. 667.

(n) *Smith v. Selwyn*, [1914] 3 K. B. 98; *Carlisle v. Orr*, [1918] 2 Ir. R. 442.

(o) *Smith v. Selwyn*, [1914] 3 K. B. 98.

(p) *Dawson v. Gt. N. Ry.*, [1905] 1 K. B. 260; *Prosser v. Edmonds* (1835), 1 Y. & C. 481; *Glegg v. Bromley*, [1912] 3 K. B. 474.

(q) See on the whole of this section Winfield, *Present Law*, pp. 67-9.

(r) See *Dawson v. Gt. N. Ry.*, [1905] 1 K. B. 260. Winfield doubts: Winfield, p. 713.

3. *Qualifications of general rule.*—But the rule is not applicable where the right assigned has some other source than an illegal act. It is on this principle that rights arising under a contract are assignable, as opposed to rights arising from the breach of a contract. So also with rights arising *quasi ex contractu*, as in the case of money paid by mistake. On the same principle, there should be no objection to the assignment of a judgment debt even in an action of tort, or to the assignment of money agreed to be paid by way of settlement of a claim in tort.

4. The rule does not prevent the assignment of property merely because it is the subject of litigation and cannot be recovered without an action. Thus, a sale of chattels by A to B while they are wrongfully detained by C is valid and confers upon B a right of action against C (s).

5. The rule does not prevent the assignment by a trustee in bankruptcy of the bankrupt's choses in action, even though they arise *ex delicto*. For the trustee has a statutory power and duty of realising the assets, and therefore of selling them if he pleases (t).

6. The rule does not prevent the subrogation of an insurer to the rights of the insured, even though these rights are rights of action for damages for a tort (u).

7. Presumably the rule does not apply to any other case in which the assignee has any lawful interest in the subject-matter sufficient to exclude the doctrine of maintenance—for example, an assignment by a trustee to his beneficiaries of a right of action for an injury to the trust estate (w).

8. The rule does not prevent the assignment of the fruits of an action in tort, *i.e.*, an assignment of the damages to be recovered in such an action—even though the assignment is made before the action has commenced or before judgment has been recovered (x). This is not the assignment of an existing cause of action. It is merely the equitable assignment of future property defined or identified by reference to such a cause of action. It confers upon the assignee no right to institute or intervene in the action, and is therefore free from that element of maintenance on which the general rule as to the non-assignability of rights of action is based.

(s) *Dawson v. Gt. N. Ry.*, [1905] 1 K. B. p. 271.

(t) *Seear v. Lawson* (1880), 15 Ch. D. 426; *Guy v. Churchill* (1888), 40 Ch. D. 481. As to the law relating to the passing of rights of action and debts of the bankrupt to the trustee in bankruptcy, *vide supra*, s. 19.

(u) *King v. Victoria Insurance Co.*, [1896] A. C. 250.

(w) *Guy v. Churchill* (1888), 40 Ch. D. 481.

(x) *Glegg v. Bromley*, [1912] 3 K. B. 474.

9. The rule does not cover a claim under the Lands Clauses Consolidation Act, 1845, for compensation for injurious affection to lands, for such a claim is not one to recover damages for a tort (*y*).

### §. 41. The Waiver of Torts (*z*)

1. *Election between action on tort and action on fictitious contract.*—There are certain cases in which a person injured by a tort is entitled, if he pleases, to waive the tort, as it is termed, and to sue instead in quasi-contract—on a contract fictitiously implied by law (*a*). In the days when forms of action still existed he had his election either to sue in *trespass*, *trover*, *case*, or some other delictual action, or to use instead the remedy appropriate to the breach of a simple contract—namely, *assumpsit*. In the days of strict pleading there were procedural advantages in selecting the form of *assumpsit*. For example, there were no pitfalls in drawing the declaration, and the cause of action did not drop with death; on the other hand the defendant could plead the general issue (*b*). Even to-day, although forms of action are now happily abolished (*c*), the process of waiving a tort has not yet ceased to be of practical importance (*d*).

2. *In what cases waiver allowed.*—The waiver of a tort is not allowed in all cases; it is a special device for special occasions. There is no general rule that he who is injured by a tort can sue on an implied contract to pay compensation for the harm so done. In what cases, then, is a waiver permitted? As the authorities stand, this question is not one which it is possible to answer completely. In certain cases when the defendant has by means of a tort become possessed of a sum of money at the expense of the plaintiff, the plaintiff may at his election sue either for damages for the tort, or for the recovery of the money thus wrongfully obtained by the defendant; and this latter action (an action for money had and

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(*y*) *Dawson v. Gt. N. Ry.*, [1905] 1 K. B. at p. 271. Probably this principle would apply to all cases of claims to compensation under similar Acts and to all actions which, though technically based on tort, are substantially claims to recover property. See Dig. s. 811.

(*z*) On this topic reference should be made to Winfield, *Province*, pp. 168-76; Jackson, *Quasi-Contract*, pp. 61-84. On the history see *United Australia, Ltd. v. Barclays Bank*, [1941] A. C. pp. 26-9 (Lord Atkin), pp. 40-2 (Lord Porter). On the American Restatement, Lord Wright, *Legal Essays*, pp. 53-4, and in 57 L. Q. R. 192.

(*a*) *Vide supra*, s. 3 (4).

(*b*) *United Australia, Ltd. v. Barclays Bank*, [1941] A. C. p. 13.

(*c*) *Vide supra*, s. 1 (2).

(*d*) *United Australia, Ltd. v. Barclays Bank*, [1939] 2 K. B. pp. 56-7.

received by the defendant to the use of the plaintiff) is based on an implied contract, the defendant being fictitiously assumed to have rightfully received the money for the plaintiff, and to have failed to pay it over to him.

This is so, for example, if the defendant wrongfully takes by trespass or obtains by fraud the money of the plaintiff (e). So also if the plaintiff's goods are wrongfully converted and sold by the defendant, the plaintiff may choose between an action of trover for the value of the goods and an action in quasi-contract for the price so received by the defendant. "If a man's goods are taken by an act of trespass and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury, or waiving the force he may maintain trover for the wrong, or waiving the tort altogether he may sue for money had and received" (f).

*Waiver a fiction.*—It is obvious that in these cases there is no real waiver, as where the forfeiture of a lease is waived by the receipt of rent. By "waiving the tort" a plaintiff does not elect to be treated from that time forward on the basis that no tort has been committed; indeed, if no tort has been committed how can an action of *assumpsit* lie? (g). It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution. "If I find that a thief has stolen my securities and is in possession of the proceeds", said Lord Atkin (h), "when I sue him for them I am not excusing him; indeed, he may be in prison upon my prosecution." A man does not in any true sense waive a wrong unless he has a real intention to waive it or such an intention can be fairly imputed to him. The waiver is as fictitious as the contract. The phrase "waive the tort" is, as Lord Romer said (i), a picturesque one and has a pleasing sound and was, perhaps for that reason, regarded by the old common lawyers with affection, but it is inaccurate. What is waived is not the tort, but the right to recover damages for it. The plaintiff does not affirm the tortious act as having been a rightful one. As the American Restatement of the Law of Restitution says (k): "The election to bring an action

(e) *Neate v. Harding* (1851), 6 Ex. 349.

(f) *Rodgers v. Maw* (1846), 15 M. & W. p. 448.

(g) *United Australia Case*, p. 18, per Lord Simon, L.C.

(h) *S.C.* p. 29.

(i) *S.C.* pp. 34-5.

(k) P. 526.

of *assumpsit* is not a waiver of tort, but is the choice of one of two alternative remedies”.

3. *Uncertain scope of rule.*—It is clear that there are torts to which the process of waiver cannot be applied, for example, defamation and assault (l), but it is far from clear how far this doctrine of the waiver of torts does extend. There are authorities which, if they could be relied on, would justify us in laying down a general rule to the effect that whenever the defendant has by his tort acquired a profit of any sort (whether it is the receipt of money or not) the tort may be waived, and an action of contract brought to compel payment of a pecuniary equivalent for that profit. Thus, in *Lightly v. Clouston* (m) the defendant had wrongfully taken the plaintiff's apprentice into his employment, and the plaintiff, instead of suing in tort for damages for this invasion of his right to the services of his apprentice, successfully sued in *assumpsit* to recover a reasonable remuneration for these services as on a contract of hiring. It is doubtful, however, whether any such general extension of the doctrine of waiver is justifiable (n). The torts which it has been held can be waived are usually conversion, trespass to land or goods, deceit and the action for extorting money by threats (o).

4. *Destruction of one cause of action by election of the other.*—In those cases in which the waiver of a tort is permitted the two causes of action—delictual and quasi-contractual—are not cumulative, but alternative. The plaintiff must make his election between them. Anything, therefore, which exhausts or extinguishes one of the causes of action destroys the other also. Thus, judgment recovered, even without satisfaction, in an action of tort merges and destroys as against the same defendant not merely the cause of action in tort, but also the cause of action in contract; and, conversely, a judgment in contract is a bar to any subsequent action based on the tort.

Accordingly, when the plaintiff's goods have been converted and sold, and he obtains judgment in an action for money had and received, he cannot thereafter resort to an action of trover; and this is so even though the damages recoverable in trover would far

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(l) *United Australia Case*, [1941] A. C. p. 12.

(m) (1808), 1 Taunt. 112.

(n) See also *Foster v. Stewart* (1814), 3 M. & S. 191; *Hambly v. Trott* (1776), Cowp. 375; *Russell v. Bell* (1842), 10 M. & W. 340; *Rumsey v. N. E. Ry.* (1863), 32 L. J. G. P. 244; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

(o) Winfield, pp. 696-8.

exceed the price for which the defendant sold the goods and for which judgment has been obtained against him (p).

5. The same result follows if one of the causes of action is destroyed, not by merger in a judgment, but by accord and satisfaction or any other form of release. The settlement of a claim or action for money had and received will effectively destroy any right to proceed subsequently for damages in tort; and this is so regardless of the relative values of the two claims (q).

Much light was thrown on the doctrine of waiver of tort by the opinions given in the House of Lords in *United Australia, Ltd. v. Barclays Bank* (r). The doctrine is based on two principles: First, there cannot be double satisfaction; if the plaintiff has recovered in contract he cannot go on to recover in tort. Secondly, he must elect between his two remedies, and there has been a difference of opinion as to when this election must take place (s). A good deal of confusion has been caused by not keeping distinct (1) election between inconsistent rights, and (2) election between alternative remedies. If a man is entitled to one of two inconsistent rights, when with full knowledge (t) he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. When his failure to do so becomes embarrassing to the defendant and the Court he may be compelled to make his election during the trial (u). But where there are alternative remedies on the same set of facts the plaintiff need not make his election until he applies for judgment (x).

6. *Two wrongdoers*.—The question remains: how far does his election to sue A in quasi-contract stand in the way of his subsequently bringing an action on the same facts against B for conversion? This was the point which actually came up for decision

(p) *Rice v. Reed*, [1900] 1 Q. B. 54; *Smith v. Baker* (1873), L. R. 8 C. P. 350; *Re Simms*, [1934] 1 Ch. 1.

(q) In all such cases, however, it is a question of fact, depending upon the intention of the parties, whether the payment made by the defendant to the plaintiff was in truth an accord and satisfaction extinguishing the cause of action, rather than a mere payment on account in reduction of damages. Compare *Rice v. Reed*, [1900] 1 Q. B. 54, and *Burn v. Morris* (1836), 4 Tyrwhitt 485, with *Brewer v. Sparrow* (1827), 7 B. & C. 310, and *Lythgoe v. Vernon* (1860), 5 H. & N. 180.

(r) [1941] A. C. 1. See Lord Wright's article on this case in 57 L. Q. R. 184.  
(s) *S.C.*, p. 28. This doctrine of election has nothing to do with the equitable doctrine of election: *Lissenden v. C. A. V. Bosch, Ltd.*, [1940] A. C. p. 418, *per* Lord Maugham.

(t) So Lord Atkin in *United Australia Case*, p. 30 Viscount Simon (at p. 20) and Lord Porter (at p. 54) left the question open.

(u) *British Ry. Traffic Co. v. Roper* (1933), 162 L. T. 217.

(x) *United Australia Case*, pp. 19, 30. Lord Porter (at p. 49) left the question open.

in the House of Lords in *United Australia Ltd. v. Barclays Bank* (y). In that case the plaintiffs made out a cheque which was wrongfully endorsed by their secretary to the M. F. G. Co. The defendants collected it on behalf of that company. The plaintiffs brought an action against the M. F. G. Co. for money had and received, but before they had obtained judgment the company went into liquidation. The plaintiffs put in a proof in the winding-up but the company had no assets and the liquidator neither admitted nor rejected the proof. They then sued the defendants, the bankers, for conversion of the cheque. It was pleaded that by their action against the M. F. G. Co. and by their proof in the winding-up they had waived their right to sue for the tort. But the House of Lords (reversing the Court of Appeal (z)) held that this was not so. The company and the bankers were not joint tortfeasors, though their independent acts had caused the same damage. Only satisfaction in the earlier proceedings would act as a bar to the second action (a). Strangely enough the Court of Appeal considered that the result at which they had arrived was a just result and were comforted by the thought that it was in accord with "general principles of right" (b). The House of Lords in reversing the decision were of opinion that they had thereby prevented substantial injustice (c).

In the *United Australia Case* it was stressed that the bank and the M. F. G. Co. were not joint tortfeasors, but since the Law Reform (Married Women and Tortfeasors) Act, 1935 (d), the reasoning would seem to apply equally to the case of joint tortfeasors (e).

It need hardly be added that if the same act constitutes two different torts the bringing of an action for both of them is no waiver of either (f).

### § 42. Foreign Torts (g) \*

1. *No action for tort in respect of foreign land.*—No action will lie in England for any trespass or other tort committed in respect

(y) [1941] A. C. 1.

(z) [1939] 2 K. B. 53.

(a) [1941] A. C. pp. 21, 31, 50-1. *Verschures Creameries v. Hull S.S. Co.*, [1921] 2 K. B. 609 (see 9th ed. of this book, s. 41 (6), n. (u)), was distinguished by Viscount Simon, L.C., Lords Atkin and Porter, the latter two thinking it rightly decided as a true case of ratification. See Lord Wright in 57 L. Q. R. pp. 191-3.

(b) [1939] 2 K. B. p. 60.

(c) [1941] A. C. pp. 21, 33, 57. Cp. Lord Wright, 57 L. Q. R. 186.

(d) *Supra*, s. 21 (3).

(e) So Sutton in Underhill, p. 108. For the old law, see 9th ed., s. 41 (6).

(f) *Gazton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 199. Cp. *United Australia Case*, [1941] A. C. pp. 18-9.

(g) For a fuller treatment of this subject see Cheshire, *Private International Law*, ch. x.



of land situated out of England (*h*). This is so even if no question as to the title to the land is in issue between the parties, and even though the property is situated in uncivilised regions out of the territory and jurisdiction of any civilised State. In the case of contracts and trusts, on the other hand, the jurisdiction of English Courts is not excluded by the fact that the land to which the contract or trust relates is out of England (*i*).

2. *Action lies for other foreign torts on two conditions.*—Except in the case of injuries to land, an action of tort will lie in England although the cause of action has arisen abroad. Provided that the person of the defendant is within the jurisdiction of the English Courts, he can be sued in England for a libel published in New York, or for an assault committed in Turkey. In order, however, that an action should thus lie for a tort committed out of England, two conditions must be fulfilled:—

- (a) The act must not have been justifiable by the law of the place where it was done;
- (b) It must be of a kind which would have been actionable had it been done in England (*k*).

A tort has not been committed in England merely because damage flowing from a wrongful act done elsewhere has been suffered in England, even in cases where damage is the gist of the action (*kk*).

3. *Act must not be justifiable where done.*—In the first place, the act must have been unlawful in the place where it was done. In *Phillips v. Eyre* (*l*) an action for false imprisonment was brought against the Governor of Jamaica, who pleaded that the arrest was made in connection with the suppression of a rebellion, and had been declared lawful subsequently by an act of the local Legislature. Cockburn, C.J., said (*m*): “It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English Court.”

(*h*) *Hugh le Pape v. Merchants of Florence* (1281), 46 Selden Society, p. 38; *British South Africa Company v. Companhia de Moçambique*, [1893] A. C. 602.

(*i*) See *Ewing v. Orr-Ewing* (1883), 9 App. Cas. p. 40, *per* Lord Selborne.

(*k*) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. 1; *Carr v. Francis, Times & Co.*, [1902] A. C. 176; *McMillan v. Canadian Northern Ry.*, [1923] A. C. 120; *Walpole v. Canadian Northern Ry.*, [1928] A. C. 113.

(*kk*) *Munro (George), Ltd. v. American Cyanamid Corporation*, [1944] K. B. p. 441, *per* du Parcq, L.J. On the question where a tort has been committed, see 7 Mod. L. R. 243.

(*l*) *Ubi supra*.

(*m*) (1869), L. R. 4 Q. B. p. 289.

4. In *Machado v. Fontes* (n) the Court of Appeal held that the act need not be *actionable* in the place where it is done in order to be actionable in England. It is sufficient if it is not legally justifiable and is punishable. In that case a plaintiff recovered damages in England for a libel published in Brazil, although libel is not in Brazil a cause of action for damages, but exclusively a criminal offence. It seems curious that a man should be held liable in damages in England for doing an act abroad which exposes him to no such liability according to the *lex loci delicti*, and without any voluntary submission on his part to the English law on the matter. The decision has been much criticised (o), and is inconsistent with the reasoning in some other cases (p) as well as with principle, and is open to review in the House of Lords.

5. *Act must be of a kind actionable by English law.*—The second condition that must be fulfilled before an action for a foreign tort will lie in England is that an act of that sort must amount to an actionable tort in accordance with the law of England—that is to say, the law which will be applied in determining the existence, measure, and nature of the defendant's liability is the law of England (the *lex fori*), and not the law of the place where the tort was committed (the *lex loci delicti*) (q). The *lex loci delicti* may serve to justify the act, as we have seen, and to exclude any action in England, but it does not create any right of action in England; for this right must be given by English law itself.

Thus in *The Halley* (r) an action was brought by the owner of a Norwegian barque against the owner of a British steamer for damage done by collision in Belgian waters. The steamer was at the time of the collision compulsorily in charge of a pilot, and compulsory

(n) [1897] 2 Q. B. 281.

(o) *E.g.*, by Cheshire, *Private International Law*, pp. 302-5; Lorenzen, 47 L. Q. R. p. 490; A. H. Robertson, 4 Mod. L. R. pp. 35-43.

(p) *The Mary Mozham* (1876), 1 P. D. 107 (where the act was certainly not innocent in Spain, yet no action lay); *McMillan v. Canadian Northern Ry.*, [1928] A. C. 120; *Walpole v. Canadian Northern Ry.*, [1923] A. C. 113. It is not accepted in Scotland: *Naftalin v. L. M. & S. Ry.*, [1933] Sc. L. T. 193. In *Munro (George), Ltd. v. American Cyanamid Corporation*, [1944] K. B. p. 440, when dealing with service of notice of writs out of the jurisdiction, Goddard, L.J., said: "It would be a very strong thing for an English Court to exercise jurisdiction over an American in respect of an act committed by him in America, although some damage might be alleged to be suffered in England, when the act in America might not be considered by the courts of that country to be tortious at all."

(q) Problems arise as to what is the *lex loci*, and what is a delict: see Lorenzen in 47 L. Q. R. pp. 491-7.

(r) (1868), L. R. 2 P. C. 193. See also *The Mary Mozham* (1876), 1 P. D. 107; *Phillips v. Eyre* (1870), L. R. 6 Q. B. at p. 28.

pilotage at that time was (s) a good defence to the ship-owner by the law of England, but not by the law of Belgium. It was held that no action would lie in England, notwithstanding the fact that the act complained of was wrongful and actionable by the *lex loci delicti*. English Courts, that is to say, will not enforce an *obligatio ex delicto* created by foreign law.

This rule is contrary to the principles of the Conflict of Laws accepted in most other countries (including America) and is said to be peculiar to England, China and Japan (t). The generally accepted principle in other countries is that where rights have been acquired abroad they should, subject to questions of public policy, be given recognition by the Courts of other countries. It is to be regretted that in this respect English law should not be in conformity with that of other countries (u). But the rules in both *Machado v. Fontes* and *The Halley* raise fundamental questions in the conflict of laws, which lie outside the province of this book.

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(s) See now Pilotage Act, 1913, s. 15.

(t) Lorenzen, Tort Liability and the Conflict of Laws, 47 L. Q. R. 488, pp. 499—501.

(u) For a full discussion of these questions with reference to the authorities, see A. H. Robertson, 4 Mod. L. R. 27.

## CHAPTER V

## EXTRAJUDICIAL REMEDIES

*Modes of permitted self-help.*—It is not necessary in all cases that a man should resort to judicial proceedings in order to seek protection or redress in respect of injuries threatened or committed against him. In many instances the law grants him liberty to help himself by his own act and strength without recourse to any Court of justice or the sanction of any judicial declaration of his rights. We shall deal in this chapter with self-redress; with self-defence and the prevention of trespass we shall deal later (a).

## § 43. Re-entry on Land

1. *Forcible entry a criminal offence.*—He who is wrongfully dispossessed of land is not bound to proceed for its recovery by action at law, for he may retake possession of it by his own act, if he can do so peaceably and without the use of force (b). A forcible entry, however, even by a person lawfully entitled to the possession, is an indictable misdemeanour under the Statutes of Forcible Entry. It is provided by 5 Rich. II, st. 1, c. 8, that under pain of imprisonment no one shall “make entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner”. Entry by means of a threat to use force will be deemed forcible, even though no force is actually used (c). The force need not consist in violence towards the person of the occupant or any one else, for it is a forcible entry to break into a house even though no one is present in it (d).

2. *Forcible ejectment.*—It is a forcible entry to enter peaceably and then eject by force the adverse occupant. Before force can be so used, real and effective possession must be obtained, and not the merely formal or nominal possession acquired by entering into premises in which a hostile possessor is still present (e).

(a) *Infra*, s. 90.

(b) *Taunton v. Costar* (1797), 7 T. R. 431.

(c) *Hawkins*, Pleas of the Crown, Ch. 64, sect. 27.

(d) *Com. Dig. Forcible Entry*, A. 2.

(e) *Bacon*, *Abridg. Forcible Entry*, B.; *Edwick v. Hawkes* (1881), 18 Ch. D. at p. 211.

3. *Forcible entry not a civil injury if right of entry exists.*—Forcible entry, however, upon a person wrongfully in possession by a person entitled to the possession is, although a criminal offence, no civil injury for which the wrongdoer so ejected has any remedy. He can neither sue in ejectment for the recovery of the land, nor in trespass for damages (f).

4. *Assault or damage incidental to forcible entry.*—If in the course of a forcible entry an assault is committed upon the occupier or other person defending the possession or damage is done to chattels upon the premises, will an action for damages lie in respect of this independent injury, although none lies for the entry and eviction itself? After some conflict of opinion (g) the Court of Appeal in *Hemmings v. Stoke Poges Golf Club* (h), following the opinion of Parke, B. (i), held that it would not. So long as no more force is used than is necessary and justifiable at common law for the ejection of a trespasser and the removal of his goods (k), the fact that the entry was a breach of the Statutes of Forcible Entry does not confer upon the person ejected any cause of action for assault or otherwise.

#### § 44. Recaption of Chattels (l)

1. *Forcible retaking of chattels.*—Any person entitled to the possession of a chattel may retake the chattel either peaceably or by the use of reasonable force from any person who has wrongfully taken or detained it from him. Such a retaking, even though forcible, is neither a civil injury nor a criminal offence (m). As to the amount of force which is permissible, and as to the necessity of a precedent request, the defence and recaption of chattels is presumably governed by the same rules as the ejectment of trespassers upon land (n). The remedy of forcible recaption is not limited to cases of the wrongful taking of chattels, but extends to all cases of the wrongful possession of them (o).

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(f) *Pollen v. Brewer* (1859), 7 C. B. (N.S.) 371; *Turner v. Meymott* (1828), 1 Bing. 158; *Burling v. Read* (1850), 11 Q. B. 904.

(g) *Newton v. Harland* (1840), 1 M. & G. 644; *Beddall v. Maitland* (1881), 17 Ch. D. 174.

(h) [1920] 1 K. B. 720.

(i) *Harvey v. Brydges* (1845), 14 M. & W. 437.

(k) *Infra*, s. 90 (9).

(l) See on this topic C. A. Branston in 28 L. Q. R. 262.

(m) *Blades v. Higgs* (1861), 10 C. B. (N.S.) 713; 11 H. L. C. 621.

(n) *Infra*, s. 90 (8) and (9).

(o) *Blades v. Higgs*, *ubi supra*. It has been doubted, indeed (C. & L. pp. 160-1), whether this remedy extends to a mere wrongful detention of a possession lawfully

2. *Entry on land to take chattels.*—It is a matter of some doubt how far the right of retaking chattels will serve to justify an entry on the land on which they are situated. It is clear, indeed, that if the occupier of the land has himself wrongfully taken and placed the goods there, the owner of them may enter and take them. But what if the occupier is in no way responsible for the presence of the goods on his land, but merely refuses to give them up, or to allow the owner to enter and take them; as in the case of a lessee who gives up possession of the land, but leaves a chattel behind him, and then seeks to recover it? This is a question that has more than once come before the Courts, but has not yet succeeded in obtaining a definite and comprehensive answer (*p*). But it is settled (*q*) that

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acquired, as in the case of a bailor refusing to return a chattel. *Cp.* 28 L. Q. R. 267. There is no suggestion of any such limitation in *Blades v. Higgs*. See also Pollock, 309.

(*p*) As the authorities stand the position seems to be as follows. A man may enter another man's land to retake his own chattels if they came there (1) by accident, e.g., if a fruit tree grow in a hedge and the fruit fall on to another's land: *The Case of Thorns* (1466), Y. B. 6 Edw. IV, 7, pl. 18; *Mitten v. Faudrye* (1626), Poph. 161; (2) by the felonious act of a third party: Blackstone, III, 5; *Higgins v. Andrewes* (1619), 2 Roll. Rep. 55. (Winfield, p. 404, sees no reason for the distinction between felonies and other crimes.) But in order to justify his entry he must show that the goods came upon the occupier's land in one of these ways or by the occupier's own act: it is not enough to prove that his property was on the land without proving the circumstances in which it came there: *Anthony v. Haney* (1832), 8 Bing. 186; still less does it suffice to justify the entry if the property came there by his own act, as in the *Case of Thorns*, *supra*, where a man cut thorns and against his wish they fell upon another's land. In *Anthony v. Haney*, *supra*, Tindal, C.J., suggested that in a case in which the occupier of the soil refused to deliver up the property, or to make any answer to the owner's demand, the owner might enter and take his property, subject to the payment of any damage he might commit. But in *Wilde v. Waters* (1855), 24 L. J. C. P. p. 195, Maule, J., said: "Where an outgoing tenant leaves a picture hanging on a wall, the new tenant may refuse to admit the owner, and may not choose to put himself to the trouble of giving it, but the picture is still the owner's chattel. The question in such a case would be whether the jury could infer from the refusal that the new tenant exercised any dominion over the chattel. If it appeared that he had merely said 'I don't want your chattel, but I shall not give myself any trouble about it' that would not give the owner an action of trover." This dictum is consistent with *Thimblethorp's Case* (quoted in *Isaack v. Clark* (1614), 2 Bulstr. p. 314) and with the decision of a Divisional Court in *British Economical Lamp Co. v. Empire, Mile End* (1913), 29 T. L. R. 386. *Cp.* *Ellis v. Noakes* (1930), [1932] 2 Ch. p. 104, *per* Lawrence, L.J. Nor does *Mills v. Brooker*. [1919] 1 K. B. 555, run counter to it, for in that case there was a perfectly clear conversion of the apples by sale. But Sir John Salmond thought that there was no real doubt that the occupier would be liable to the plaintiff in an action of trover (6th ed. p. 211), and in *Thorogood v. Robinson* (1845), 6 Q. B. 769, it was held that in such a case as that put by Maule, J., there would be a conversion if the new tenant did not, on demand, either allow the owner to remove the goods, or remove them himself to some convenient place. For other authorities, see *Patrick v. Colerick* (1838), 3 M. & W. 483; *Webb v. Beavan* (1844), 6 M. & G. 1055. See also the discussion during argument in *Kearry v. Pattinson*, [1939] 1 K. B. 471, where it was held unnecessary to decide any such point. The cases are carefully discussed in Winfield, pp. 401-6.

(*q*) *Kearry v. Pattinson*, [1939] 1 K. B. 471.

a man who has hived bees has no right if they swarm to follow them on to another man's land, for when they get there they once more become *ferae naturae* and are the property of no one until they are again hived. And Goddard, L.J., said (r): "You cannot demand entry upon another man's land for the purpose of retaking animals."

### § 45. Abatement of Nuisances

1. *Occupier of land may abate a nuisance.*—It is lawful for any occupier of land, or for any other person by the authority of the occupier, to abate (*i.e.*, to terminate by his own act) any nuisance by which that land is injuriously affected. Thus the occupier of land may cut off the overhanging branches of his neighbour's trees, or sever roots which have spread from these trees into his own land (*s*). So also he may pull down an obstruction to his ancient lights, remove any barrier erected elsewhere against the flow of a natural stream through his land, divert a stream of water which is wrongfully cast upon his land, break down a fence which obstructs his right of way, or put out a dangerous fire which has been lighted or suffered to burn upon the adjoining property (*t*).

2. *Entry on land for this purpose.*—Subject to certain requirements as to prior notice, which will be considered later, the right of abatement extends to the cases in which it is necessary for the abator to enter upon the land of the other party, no less than to those cases in which he can attain his purpose by acts done exclusively on his own property.

3. *Unnecessary damage.*—In abating a nuisance any unnecessary damage done is an actionable wrong (*u*), and, therefore, where there are two ways of abating a nuisance, the less mischievous is to be followed, unless it would inflict some wrong on an innocent third party or the public, and previous notice is given when necessary (*x*).

4. *Alternative to damages.*—The right of abatement is alternative to damages. If the nuisance is abated, no damages can be

(r) *S.C.*, p. 481.

(s) *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1; *Butler v. Standard Telephones*, [1940] 1 K. B. 399. He may not, however, appropriate to his own use the things so severed, and if he does so, he is liable in trover for their value: *Mills v. Brooker*, [1919] 1 K. B. 555.

(t) See on the whole matter: *Jones v. Williams* (1843), 11 M. & W. 176; *Penruddock's Case* (1597), 5 Co. Rep. 101; *Earl of Lonsdale v. Nelson* (1823), 2 B. & C. 302; *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

(u) *Roberts v. Rose* (1865), 4 H. & C. 103.

(x) *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. p. 245.

obtained in respect of the injury suffered. The exercise of the right of abatement destroys any right of action in respect of the nuisance (y).

5. *No right of abatement where no injunction could be obtained, but sometimes where no actionable nuisance.*—It is to be assumed that there is no right of entry and abatement in a case in which, although an actionable nuisance exists, an injunction against the continuance of it could not be obtained. If, for example, a house is built which obstructs ancient lights, but to so small an extent or under such circumstances that no mandatory injunction would be granted to pull the house down, it cannot be supposed that the owner of the obstructed light is nevertheless at liberty to attain the same end by the exercise of his right of abatement (z). Strangely enough, however, there may apparently be a right of entry and abatement where there is no action for damages for the nuisance. So no damages can be obtained against a defendant who has allowed a tree to overgrow his boundary, unless it is the cause of actual damage (a); for damage is of the essence of nuisance. But there is no reason to suppose that the right of the neighbour to cut the encroaching roots and branches is subject to any such limitation (b).

6. *In whom right vested.*—In ordinary cases the right of abatement, like the right of action for a nuisance, is vested exclusively in the occupier of the land affected; but there seems no reason why a similar right should not belong to the owner of a reversionary interest in the land in those exceptional cases in which a nuisance is actionable at his suit.

7. *Necessity of notice before abatement.*—The question of the necessity of notice before abatement is one involved in some

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(y) *Baten's Case* (1610), 9 Co. Rep. 53 b; *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. p. 244.

(z) This question is discussed but not decided in *Lane v. Capsey*, [1891] 3 Ch. 411.

(a) *Smith v. Giddy*, [1904] 2 K. B. 448; *Lemmon v. Webb*, [1894] 3 Ch. p. 11, per Lindley, L.J.

(b) Salmond regarded this as going further than a mere right of abating a nuisance—as simply a part of the occupier's exclusive right of possession, and of doing as he pleases with his own. But the overhanging branches and the encroaching roots are until severance realty, and realty which is the property of the owner of the tree: *Lemmon v. Webb*, [1894] 3 Ch. p. 20, per Kay, L.J.; *Mills v. Brooker*, [1919] 1 K. B. 555. An overhanging roof or cornice has been held to be a nuisance to the land it overhangs because of the necessary tendency to discharge rain-water upon it: *Baten's Case* (1610), 9 Co. Rep. 53 b. It is possible that in early days on a parity of reasoning overhanging branches were similarly regarded, and that the doctrine that in such cases special damage must be proved is of later growth.



uncertainty. It is clear, however, that there are at least two cases in which no notice is required:—

- (a) When there is no entry on the land of the other party—*e.g.*, cutting roots and branches (c);
- (b) In case of emergency—*i.e.*, where the nuisance threatens such immediate harm to person or property that the delay involved in giving notice would be unreasonable (d).

It seems clear also that there are four cases in which notice must be given:—

- (a) When the nuisance was committed, not by the present occupier, but by a predecessor in title (e).
- (b) When the occupier is not responsible for the creation or continuance of the nuisance (e).
- (c) When the abatement involves the demolition of a house which is actually inhabited (f).
- (d) When the more mischievous of two ways of abating a nuisance is followed (g).

Whether notice is required in other cases is a question to which no certain reply can be given. In *Lemmon v. Webb* (h) there is an obvious inclination to state the rule in the general form, that in all cases of entry and abatement notice is required except in case of emergency. In *Jones v. Williams* (i), on the other hand, the opinion is expressed that the requirement of notice is exceptional (k).

8. *Abatement of nuisances to a highway.*—It is lawful for any person to abate a public nuisance to a highway, so far as it is necessary to enable him to exercise his right of way thereon. Thus, if a fence is unlawfully erected across a highway, or a gate wrongfully locked, any member of the public may in the exercise of his right of way remove the fence or break open the gate. And this is so even though the obstruction has been erected in the exercise of a *bona fide* but unfounded claim of right. Probably this right of abatement exists even though the abator cannot prove that he has sustained

(c) *Lemmon v. Webb*, [1895] A. C. 1.

(d) *Jones v. Williams* (1843), 11 M. & W. p. 182; *Lemmon v. Webb*, [1894] 3 Ch. p. 13.

(e) *Jones v. Williams* (1843), 11 M. & W. 176.

(f) *Davies v. Williams* (1851), 16 Q. B. 546.

(g) *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. p. 245.

(h) [1895] A. C. 1.

(i) (1843), 11 M. & W. 176.

(k) In *Earl of Lonsdale v. Nelson* (1823), 2 B. & C. 302, a distinction is drawn by Best, J., between nuisances of omission and of commission, but as to this, see the criticism of Lord Davey in *Lemmon v. Webb*, [1895] A. C. p. 8, and the explanation of Parke, B., in *Jones v. Williams*, 11 M. & W. p. 181.

any such special damage as is required to confer upon him any private right of action (l).

The right of abating a nuisance on a highway extends only to nuisances of commission, and not to those of omission so as to entitle any member of the public to undertake the repair of a highway or the creation thereon of a permanent structure, such as a bridge which he may consider necessary for the convenient exercise of his right of passage. Such acts must be done by those who are charged with the common law or statutory duty of repairing or constructing highways (m).

9. "The abatement of a nuisance is a remedy which the law does not favour and is not usually advisable" (n). Long ago in the seventeenth century Lord Hale wrote of the remedy by abatement: "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice" (o). Abatement has fallen into almost complete disuse except as regards rights of common, rights of way and rights of water. An injunction or a mandatory order has practically the effect of abatement, and abatement will probably fall still further into disfavour.

#### § 46. Distress Damage Feasant (p)

1. It is lawful for any occupier of land to seize any cattle or other chattels which are unlawfully upon his land and have done (q) or are doing damage there, and to detain them until payment of compensation for the damage done. This right is known as that of distress damage feasant and, as has been pointed out by Dr. Glanville Williams (r), is the only survival in modern law of "thing-liability" (s). In all ordinary cases the things so distrained are cattle or other trespassing animals, but the right extends to all chattels animate or inanimate. Thus a railway company has been

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(l) *Webber v. Sparkes* (1842), 10 M. & W. 485; *Dimes v. Petley* (1850), 15 Q. B. 276; *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316. *Vide infra*, s. 69 (5)–(9).

(m) *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518.

(n) *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. p. 244, *per* Lord Atkinson. *Cp. Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. pp. 911, 920, *per* Lords Wright and Porter.

(o) *De Port. Mar.* (Hargrave's Law Tracts), Pt. ii, c. 7.

(p) See the learned and exhaustive discussion of this topic in Williams, *Animals*, pp. 1–123.

(q) *Vide, infra*, s. 46 (6).

(r) Williams, *Animals*, p. 108 and Ch. XV.

(s) *I.e.*, the chattel itself, not its owner, is liable

held entitled to seize and detain a locomotive engine which was wrongfully encumbering its lines (t). Distress damage feasant differs from other forms of distress in that it is a remedy which can be exercised out of hand, at any time of the day or night (u).

2. *Right limited to occupier.*—The right of distress damage feasant is vested, in general, only in the occupier of land. Mere use without exclusive possession is, it may be assumed, as insufficient to confer this right as it is to confer the right to eject a trespasser or to sue in an action of trespass (x).

3. *No right of distress if no right of action.*—The thing distrained must be unlawfully on the land—i.e., it must be there under such circumstances that an action for damages will lie against the owner or some other person responsible for it. Where no action will lie, there can be no distress either: for example, when cattle, being lawfully driven along the highway, stray into the adjoining land, there is neither action nor right of distress unless they are allowed to remain there for a time longer than is reasonably necessary for their removal (y). The right of action, however, need not be against the owner of the thing distrained. If the thing is present by the wrong of him who had the custody of it, or possibly even by the wrong of a mere stranger, it may be seized and detained as a security for compensation (z).

4. *Necessity of actual damage.*—There must be actual damage done by the thing distrained; for it is rightly taken and detained only as a security for the payment of compensation, and when there is no damage done there can be no compensation due (a). Though there can be no right of distress unless there has been an infringement of the right to land either by trespass or nuisance, once that infringement is established (b) the damage need not be done to the land itself or to things forming part of the freehold, such as crops.

(t) *Ambergate Ry. v. Midland Ry.* (1853), 2 E. & B. 793.

(u) *Watkinson v. Hollington*, [1944] 1 K. B. 16, where Scott, L.J., gives a useful summary of the law on this subject. As reported in [1943] 2 A. E. R. 578, he said that the right differed because it was exercised not by taking but by keeping possession.

(x) Cp. *Burt v. Moor* (1793), 5 T. R. 329, and *Williams, Animals*, pp. 43-9.

(y) *Tillett v. Ward* (1882), 10 Q. B. D. 17; *Goodwyn v. Cheveley* (1859), 4 H. & N. 631.

(z) 1 Roll. Ab. 665, Distress, D.

(a) Sir John Salmond's statement seems correct in spite of the doubts of *Williams, Animals*, pp. 70-6, and Winfield, p. 361. It seems unlikely that the Courts, with their bias against self-help, will override the authorities which support his statement.

(b) *Williams, Animals*, pp. 65-8.

It is sufficient if damage is done on the land to the property or, presumably, the person of the occupier (c). Thus, in *Boden v. Roscoe* (d) it was held that a pony might be lawfully distrained for trespassing in a field and there kicking a filly belonging to the occupier.

5. *Limits of right of distress.*—The thing must be seized while still on the land. There is no right of following it, even in fresh pursuit, and even if it is purposely removed by its owner in order to avoid distress (e). But once the beasts have been distrained, they can be retaken in fresh pursuit, if they have escaped (f).

6. In spite of some authority to the contrary it does not seem that the thing distrained need have been caught *flagrante delicto* doing damage (g), but if the same thing comes more than once upon the same land it cannot be distrained or detained on a subsequent occasion in respect of damage done by it on a former visit (h).

7. If several animals or other things belonging to the same owner trespass and do damage, each of them can be distrained and held for its own share of the damage only; one of them cannot be detained as a security for the whole claim (i).

8. It is not lawful by way of distress damage feasant to take a thing out of the immediate personal control or use of another person: for example, a horse which another person is wrongfully riding across one's land (k). This is an exception said to be established in the interests of the public peace. Nevertheless the occupier retains his right of forcibly removing from the land, though not of seizing and detaining, the things which a trespasser thus brings with him (kk).

9. *No right of sale.*—The right of distress damage feasant includes no right of sale, but merely a right to retain the thing until adequate compensation is made. Formerly the law was the same in the case of distress for rent also, but the statutes which

(c) See the discussion of this point, *ibid.*, pp. 79—80.

(d) [1894] 1 Q. B. 608.

(e) *Vaspor v. Edwards* (1701), 12 Mod. 658; 1 Co. Inst. 161a; *Clement v. Milner* (1800), 3 Esp. 95; Williams, Animals, pp. 59—61.

(f) Williams, Animals, pp. 103—4.

(g) *Ibid.*, pp. 84—5.

(h) *Vaspor v. Edwards* (1701), 12 Mod. p. 660; Williams, Animals, pp. 83—4.

(i) *Vaspor v. Edwards* (1701), 12 Mod. p. 660; Williams, Animals, pp. 81—2.

(k) *Storey v. Robinson* (1795), 6 T. R. 188; *Field v. Adams* (1840), 12 A. & E. 649.

(kk) *Vide infra*, s. 90 (6).

confer a power of sale on landlords have left unaffected the common law as to distress damage feasant (l).

10. *How things distrained are to be dealt with.*—Things distrained damage feasant may at the option of the distrainor be kept by him on the premises where they were seized, or kept in his own custody elsewhere, or impounded by him in a public pound (m). By the Protection of Animals Act, 1910 (s. 7), he is bound to provide animals impounded by him with food and water.

11. *Right of action suspended by distress.*—The exercise of the right of distress damage feasant suspends the right of action for the damage complained of, so long as the detention of the property continues. Distress and action are alternative remedies which cannot be concurrently pursued. If, however, the property distrained perishes or is lost without the distrainor's fault, he is remitted to his right of action, and so also if the property is restored to the owner (n).

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(l) In one respect distress damage feasant is more favoured than other forms of distress: it may take place at night: "otherwise it may be the beasts will be gone before he can take them." Co. Litt. 142a.

(m) *Vaspor v. Edwards* (1701), 12 Mod. at p. 664.

(n) *Vaspor v. Edwards* (1701), 12 Mod. 658; *Lehain v. Philpott* (1875), L. R. 10 Ex. 242; *Boden v. Roscoe*, [1894] 1 Q. B. 608; *Williams v. Price* (1832), 3 B. & Ad. 695. Cp. *Williams, Animals*, p. 195.

## CHAPTER VI

### TRESPASS TO LAND

#### § 47. The Nature of Trespass to Land

1. *Trespass quare clausum fregit defined.*—The wrong of trespass to land (*trespass quare clausum fregit*) consists in the act of (a) entering upon land in the possession of the plaintiff, or (b) remaining upon such land, or (c) placing or throwing any material object upon it—in each case without lawful justification.

2. *Trespass by wrongful entry.*—The commonest form of trespass consists in a personal entry by the defendant, or by some other person through his procurement, into land or buildings occupied by the plaintiff. The slightest crossing of the boundary is sufficient—*e.g.*, to put one's hand through a window, or to sit upon a fence. Nor, indeed, does it seem essential that there should be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property (a).

3. *Trespass actionable per se, and even if under mistake.*—This like all other forms of trespass is actionable *per se* without any proof of damage (b). If the entry is intentional, it is actionable even though made under an inevitable mistake of law or fact and even though the defendant honestly believed that the land was his own or that he had a right of entry on it (c), and therefore an action of trespass may be used to determine a disputed title to land.

*Inevitable accident.*—Whether an accidental as opposed to a mistaken entry is actionable is open to doubt: there is little or no authority upon the point and the matter is of small importance, though there has been a good deal of discussion upon it. The Statute of Limitations, 1623, enacts that in all actions of trespass *quare clausum fregit* the defendant may plead a disclaimer of any title or claim to the land, that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends before action

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(a) Cf. *Gregory v. Piper* (1829), 9 B. & C. 591.

(b) *Ashby v. White*, 2 Ld. Raym. p. 955, *per* Holt, C.J.

(c) *Basely v. Clarkson* (1682), 3 Lev. 87, where in mowing his own land the defendant by mistake mowed grass on the plaintiff's adjoining land.

brought in which case the plaintiff is barred of his action. This seems to imply that an involuntary trespass is actionable if no amends are tendered. The statute has been very strictly construed (d) and in effect only gives protection in cases of cattle-trespass. The ordinary rambler in the country trespasses by mistake, not involuntarily (e). But in *Beckwith v. Shordike* (f) it seems to have been the opinion of the Court that it might be a good defence to prove that the trespass was accidental and involuntary, for example, trespass by one's dog (g).

4. *Trespass by abuse of right of entry*.—Even he who has a right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose. The chief application of this rule is the abuse of a right of way, public or private; but presumably the same principle applies to all rights of entry. A public highway is a piece of land vested either in some local authority or in the adjoining landowners, and subject to a public right of way (h). Any person, therefore, who uses a highway for any purpose other than that of passage (including the subordinate purposes reasonably and ordinarily incident to passage, such as sitting down to rest or perhaps even to sketch (i)) becomes thereby a trespasser against the owner of the soil, and like any other trespasser may be either sued in trespass or forcibly ejected. Thus, it is a trespass to depasture one's cattle on the highway (k), or to go there for the purpose of interfering with the adjoining occupier's right of shooting (l), or of watching what is being done on the adjoining land (m). So it is a trespass against the Crown to use the foreshore for the purpose of bathing in the sea. The only right to enter upon the shore when dry is for the purposes of navigation or

(d) *Basely v. Clarkson* (1682), 3 Lev. 37.

(e) Williams, *Animals*, p. 196.

(f) (1767), 4 Burr. 2092.

(g) See Gold in 21 Bell Yard, pp. 28–31. Salmond (6th ed.), p. 222, thought inevitable accident a good defence in such cases. So also Street, *Foundations*, i, p. 80; Jeremiah Smith, 30 H. L. R. pp. 321–3, *Harvard Essays*, pp. 200–2. Holdsworth, H. E. L., viii, pp. 465–8, apparently thinks inevitable accident no defence to an action of trespass to land or goods, but he seems to treat inevitable mistake as the same as inevitable accident. *Vide infra*, s. 90 (15).

(h) See Winfield, pp. 344–7.

(i) See *Liddle v. Yorkshire (North Riding) C.C.*, [1934] 2 K. B. p. 127, and Winfield, p. 346.

(k) *Dovaston v. Payne* (1795), 2 H. Bl. 527.

(l) *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142.

(m) *Hickman v. Maisey*, [1900] 1 Q. B. 752. Cp. *The Carlgarth*, [1927] P. p. 107, where Scrutton, L.J., said: "There is no right to sit in the middle of a road and say one is exercising a right to use a public roadway."

shipping. The public have certain rights of fishing and of necessity over the foreshore, but no general right of way along it (n).

It is not necessary that the thing so done in abuse of the right of entry should be the cause of any harm to the occupier of the land or to anyone else. It is enough that it falls outside the purpose for which the right is conferred. But if the act done on the land is within that purpose, it does not matter what ulterior object the defendant may have in exercising his right of entry. Thus, it is not a trespass to walk along a highway with the object of committing a crime elsewhere (o). Moreover, even a wrongful act done upon the land itself does not make the defendant a trespasser within the present rule, unless it can be shown that he entered for that purpose. If he entered for a lawful purpose, he is no trespasser unless the case is one to which the doctrine of trespass *ab initio* applies (p).

5. *Trespass by remaining on land.*—Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff's land is as much a trespass as to enter originally without right. Thus, any person who is present by the leave and licence of the occupier may, on the termination of that licence, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time (pp) he fails to leave the premises (q).

*Wrongful possession no trespass.*—The above case must be distinguished from that of a person lawfully in possession of land who refuses or omits to give it up on the termination of his lease or other interest. A lessee holding over is no trespasser; for a trespass can be committed, as we shall see, only against the person in the present possession of the property (r).

6. *Trespass by placing things on land.*—It is a trespass to cause any physical object to cross the boundary of the plaintiff's land, or even to come into physical contact with the land, even though there

(n) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Llandudno U. D. C. v. Woods*, [1899] 2 Ch. 705; *Brinckman v. Matley*, [1904] 2 Ch. 813; *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310. The first three cases are criticised by Lemmon, *Public Rights in the Seashore* (1934), pp. 191-9.

(o) *Harrison v. Duke of Rutland*, [1893] 1 Q. B. p. 158, *per* Kay, L.J.

(p) *Hickman v. Maisey*, [1900] 1 Q. B. at p. 757, *per* Collins, L.J. *Vide infra*, s. 49.

(pp) *Minister of Health v. Bellotti*, [1944] K. B. 298.

(q) *Wood v. Leadbitter* (1845), 13 M. & W. 838. *Vide infra*, s. 59 (4).

(r) *Hey v. Moorhouse* (1839), 6 Bing. N. C. 52. *Cp. Meyer v. Electrical Transmission, Ltd.* (1942), 111 L. J. Ch. 203.



may be no crossing of the boundary: for example, to turn cattle upon the land, or to throw stones upon it, or to drive nails into a wall, to allow a virginia creeper to grow upon it, or to lean a ladder, planks or a shed, or to pile rubbish, against it (s).

In all such cases, in order to be actionable as a trespass, the injury must be *direct*, within the meaning of the distinction between direct and consequential injuries which has been already explained as determining the line between trespass and case. It is a trespass, and therefore actionable *per se*, directly to place material objects upon another's land; it is not a trespass, but at the most a nuisance or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbour's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance (t).

7. *Continuing trespasses*.—That trespass by way of personal entry is a *continuing* injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. "A continuation of every trespass is in law a new trespass" (u). It is well settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing; successive actions will lie from day to day until it is so removed; and in each action damages (unless awarded in lieu of an injunction) are assessed only up to the date of the action (w). Whether this doctrine is either logical or convenient may be a question, but it has been repeatedly decided to be the law. Thus, in *Hudson v. Nicholson* (x) the defendant wrongfully

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(s) Chitty's Pleading, I. 199, 7th ed.; *Pickering v. Rudd* (1815), 4 Camp. p. 220; *Gregory v. Piper* (1829), 9 B. & C. 591; *Simpson v. Weber* (1925), 41 T. L. R. 302; *Westripp v. Baldock* (1938), 159 L. T. 65. With this last case contrast the dictum of Kay, L.J., in *Lemmon v. Webb*, [1894] 3 Ch. p. 24.

(t) It is true that under the old practice the wrong of allowing cattle to stray into another's land was dealt with by writ of trespass, but this must be regarded as an anomaly. Chitty's Pleading, I, 202 (7th ed.). To *drive* cattle upon another's land is a true trespass; to *allow* them by default of fencing or watching to escape into another's land is not in truth a trespass, but a nuisance, and in strictness the remedy ought to have been in *case*. It is impossible logically to class the escape of cattle as a trespass, and the escape of water as a nuisance. The fact that cattle are animate, water is inanimate, seems logically to make no difference to the defendant's position. Cp. Williams, Animals, pp. 133-4.

(u) *Winterbourne v. Morgan* (1809), 11 East, p. 405.

(w) *Supra*, s. 35 (5), (6), (9).

(x) (1839), 5 M. & W. 437. See also *Holmes v. Wilson* (1839), 10 A. & E. 508.

placed certain timbers on the adjoining land in order to support his house. This land having been subsequently purchased by the plaintiff, he was held entitled to sue in trespass for the continuance of the timbers on his property (y). It seems that, if things are placed on land under leave and licence and are not removed within a reasonable time after the licence is withdrawn, a continuing trespass is committed (z).

These cases of continuing trespass must be distinguished from cases of the continuing *consequences* of trespass which is over and done with. If I trespass on another's land, and make an excavation there without leaving any rubbish on the land, the trespass ceases so soon as I leave the land, and does not continue until I have filled the excavation up again. Consequently only one action will lie, and in it full damages are recoverable for both the past and the future (a). *Aliter* if I have brought a heap of soil and left it on the plaintiff's land.

8. *Trespass beneath the surface*.—In general he who owns or possesses the surface of land owns or possesses all the underlying *strata* also (b). Any entry beneath the surface, therefore, at whatever depth, is an actionable trespass; as when the owner of an adjoining coal-mine takes coal from under the plaintiff's land. Where the possession of the surface has become separated from that of the subsoil (as by a conveyance of the subsoil for mining purposes, reserving the surface) any infringement of the horizontal boundary thus created is a trespass.

9. *Trespass above the surface*.—It is commonly said that the ownership and possession of land bring with them the ownership and possession of the column of space above the surface *ad infinitum*. *Cujus est solum, ejus est usque ad coelum* (c). This is doubtless

(y) See also *Bowyer v. Cooke* (1847), 4 C. B. 236.

(z) *Konskier v. Goodman*, [1928] 1 K. B. 421 (debris left on premises of predecessor of plaintiff). *Contra* Goodhart, 55 L. Q. R. p. 124; Winfield, p. 353. Compare, however, the case of persons entering under leave and licence, *supra*, s. 47 (6). But if the defendant's predecessor in title has placed the things on the land under leave and licence there is no trespass, though there may be an action in case: *Shapcott v. Muggford* (1697), 1 Ld. Raym. 168; Williams, *Animals*, p. 151.

(a) *Clegg v. Dearden* (1848), 12 Q. B. 576.

(b) *Corbett v. Hill* (1870), L. R. 9 Eq. p. 673. As to the ownership of the subsoil of highways, see *Coverdale v. Charlton* (1878), 4 Q. B. D. 104; *Mayor of Tunbridge Wells v. Baird*, [1896] A. C. 434.

(c) Co. Litt. 4a; *Corbett v. Hill* (1870), L. R. 9 Eq. 671. It is doubtful whether this maxim came into English law from Roman or from Jewish sources: see 47 L. Q. R. p. 14; McNair, *Air*, ch. 2.

true to this extent, that the owner of the land has the right to use for his own purposes, to the exclusion of all other persons, the space above it *ad infinitum*. He may build the Tower of Babel if he pleases, and may remove all things situated above the surface, even though they are the property of others, and though their presence there does him no harm and is no wrong for which he has any right of action against their owners. Thus, he may cut the overhanging branches of a tree growing in his neighbour's land, whether they do him harm or not (*d*); yet he has no right of action against the owner of the tree unless he can show actual damage (*e*). So he may cut and remove a telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether he can show that he suffers any harm or inconvenience from it or not (*f*).

It does not follow from this, however, that an entry above the surface is in itself an actionable trespass. Sir John Salmond thought that such an extension of the rights of a landowner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in an aeroplane, or fire artillery, even in cases where no actual or probable damage, danger, or inconvenience could be proved by the subjacent landowners. In his submission there could be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil), and a mere entry into the air-space above the land was not an actionable wrong unless it caused some harm, danger, or inconvenience to the occupier of the surface. When any such harm, danger, or inconvenience does exist, there is a cause of action in the nature of nuisance. The state of the authorities is such that it is impossible to say with any confidence what the law on this point really is (*g*). But on the whole it seems more consistent with principle

(*d*) *Lemmon v. Webb*, [1895] A. C. 1.

(*e*) *Smith v. Giddy*, [1904] 2 K. B. 448. *Vide infra*, s. 54.

(*f*) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. p. 927, *per Fry, L.J.*

(*g*) In *Pickering v. Rudd* (1815), 4 Camp. 219, trespass was brought for the fixing by the defendant on his own land of a board which projected into the space above the plaintiff's land. But Lord Ellenborough said: "I do not think it is a trespass to interfere with the column of air superincumbent on the close. . . . If any damage arises from the object which overhangs the close the remedy is by an action on the case." See also *Clifton v. Viscount Bury* (1887), 4 T. L. R. 8 (firing of projectiles). On the other hand, in *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904, at pp. 915, 919, 927, it seems to have been

to say that a direct infringement of the air-space over another man's land is a trespass (*h*). This view is impliedly supported by the statute to which we shall now refer.

In respect of aeroplanes and other aircraft this matter is now dealt with by statute. By section 9 of the Air Navigation Act, 1920, it is provided that "no action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with". The convention so referred to is the International Convention of 1919 as to the use of Aircraft. The same section of the same Act, however, makes the owner of aircraft absolutely liable for all actual damage done by it while in flight, whether to person or property, "without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect, or default", except where there is contributory negligence, and gives the owner a right of action over against the person whose negligence actually caused the damage (*i*) (*k*).

The Act does not apply to aircraft in the service of His Majesty, and the immunity granted by section 9 does not apply to aircraft which have not complied with the provisions of the Act or to aircraft

assumed by the Court of Appeal that any entry into the space above a plaintiff's land is actionable as a trespass *per se*. Cp. *Fay v. Prentice* (1845), 1 C. B. p. 885, *per* Maule, J. (*arguendo*). And in *Gifford v. Dent*, [1926] W. N. 386, Romer, J., thought it clear that an illuminated sign projecting from a second-floor room was a trespass against the occupier of the forecourt over which it projected, although it did not cause damage or annoyance to anyone. He distinguished the right of the tenant of the second floor to put his head out of the window on the ground that that was a necessary concomitant of his tenancy and was not a permanent occupation. The case was, however, brought for an injunction and not for damages. See also *Kenyon v. Hart* (1865), 6 B. & S. p. 252, *per* Blackburn, J. In *Fay v. Prentice* (1845), 1 C. B. 828, *Baten's Case* (1610), 9 Rep. 53, and *Penruddock's Case* (1597), 5 Rep. 100, projections over the plaintiff's land were dealt with as nuisances, not as trespasses. As to things placed over a public highway, see *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904. See also *Andrews v. Abertillery Urban Council*, [1911] 2 Ch. pp. 406, 408, 413, 415.

(*h*) The whole subject is exhaustively discussed in McNair, *Air*, ch. 2. Cp. Miles in Dig. p. 358; Winfield, pp. 347-50; Thurston, *Trespass to Air Space*, Harvard Legal Essays (1934); American Restatement, s. 159. Pollock suggests (p. 278) that the scope of trespass may be limited by that of possible effective possession, "which might be the most reasonable rule".

(*i*) The Air Navigation Act, 1920, was amended in some details by the Air Navigation Act, 1936.

(*k*) Neither the common law nor international law recognise a positive right of free passage in the air, for which some continental writers contend. The International Convention of 1919 explicitly recognised full national dominion.

not possessing the nationality of a State party to the Convention. In all such cases the law to be applied is still the common law (l).

### § 48. The Title of the Plaintiff

1. *Plaintiff must be in possession.*—A trespass is actionable only at the suit of him who is in possession of the land. This form of injury is essentially a violation of the right of possession, not of the right of property. It is a disturbance of the right of exclusive use vested in the occupier of land. Ownership unaccompanied by possession is protected by other remedies, but not by an action of trespass (m). Thus, a landlord cannot sue for a mere trespass to land in the occupation of his tenant; such an action can be brought only by the tenant (n). The landlord has no right of action unless he can prove more than a mere trespass—viz., actual harm done to the property, of such sort as to affect the value of his reversionary interest in it (o).

2. *Use of land without possession not sufficient.*—For the same reason the mere use of land, without the exclusive possession of it, is not a sufficient title to found an action of trespass for the disturbance of that use. Thus, in general a lodger or boarder has no possession of the room in which he is lodged, and cannot sue in trespass for any disturbance of his use of it (p). So with a guest at an inn or in a private house, or with a domestic servant or other member of a household. So also with the use of a seat in a theatre or a railway carriage (q) or the right to post advertisements on a wall or hoarding. Whether a person having thus the use of land

(l) See *McNair*, Air, ch. 4. As to the liability of carriers by air for damage sustained by passengers or goods carried (whether gratuitously or for reward) on international carriage, see Carriage by Air Act, 1932, First Sched., Arts. 1 and 17–30.

(m) *Cooper v. Crabtree* (1882), 20 Ch. D. 589; *Wallis v. Hands*, [1898] 2 Ch. 75; *Chowood v. Lyall* (No. 2). [1930] 2 Ch. p. 164.

(n) In *Attersoll v. Stevens* (1808), 1 Taunt. p. 190, Mansfield, C.J., held that where a trespass had been committed to land in the occupation of a tenant at will either the tenant at will or the immediate landlord could sue. But a landlord who is excluded from possession by a trespasser is not himself in possession: *Holden v. Howard*, [1938] 1 K. B. p. 445, per Greene, M.R.

(o) The rights of reversionary owners will be considered in a later chapter, s. 86.

(p) *Allan v. Liverpool Overseers* (1874), L. R. 9 Q. B. pp. 191–2. This probably applies only to lodgers or guests at an inn to whom no specific room has been assigned. See *Lane v. Dixon* (1847), 3 C. B. 776; Cl. & L. (9th ed.), pp. 408–9. *Contra* Cheshire, Real Property, p. 126.

(q) Winfield, p. 336, suggests that a man who has reserved a seat, e.g., by leaving his hat on it, gets *de facto* possession, but it is difficult to see how such a case differs from that put by Maule, J. (during argument) in *Lane v. Dixon* [1847], 3 C. B. at p. 784, of the lodger in an inn who has a mere “easement” of sleeping in one room, and eating and drinking in another.

without the possession of it has any remedy at all against a stranger who disturbs him is a question which we shall consider later (r). In the meantime it is enough to note that he cannot sue as for a trespass to land, or exercise the rights of self-help available in the case of trespassers (s). The purchaser, however, of a standing crop or of other things attached to land and removable by the purchaser acquires by his purchase a sufficient possession to enable him to bring an action of trespass *quare clausum fregit* for injury to the thing so purchased: as, for example, when damage is done by cattle straying from adjoining land through defect of fences (t). So the grant of a right to take the herbage on a certain field by the mouths of the grantee's sheep involves the grantor parting with the right of possession, so that the grantor cannot bring trespass (u).

3. *Jus tertii no defence in action of trespass.*—The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words, no defendant in an action of trespass can plead the *jus tertii*—the right of possession outstanding in some third person—as against the fact of possession in the plaintiff (w). *Adversus extraneos vitiosa possessio prodesse solet*. It is otherwise, of course, if the defendant has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled.

4. *Trespass by relation.*—He who has a right to the immediate possession of land, and enters in the exercise of that right, is then deemed by a legal fiction to have been in possession ever since the accrual of his right of entry, and may accordingly sue for any trespass committed since that time. This is known as the doctrine of trespass by relation, because the plaintiff's possession relates back to the time when he first acquired a right to the possession (x).

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(r) *Infra*, s. 59.

(s) *Infra*, s. 90 (7).

(t) *Wellaway v. Courtier*, [1918] 1 K. B. 200. Cp. *Back v. Daniels*, [1925] 1 K. B. 526.

(u) *Richards v. Davies*, [1921] 1 Ch. 90.

(w) *Graham v. Peat* (1801), 1 East 244; *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. 84.

(x) This fiction was "created by law for the purpose of preventing wrong from being punishable". *Barnett v. Earl of Guildford* (1855), 11 Ex. p. 33, per Parke, B.

Thus, a person wrongfully disseised of his land may after re-entry sue for any trespass committed on the land during the period of his dispossession. So a lessee may sue for a trespass done between the granting of the lease and his entry in pursuance of it. So a landlord entitled to re-enter after the termination of the lease may after re-entry sue for any trespass committed since the lease determined (y). We shall see in the next chapter how the action for mesne profits in case of dispossession is founded on the same rule of trespass by relation.

5. *Trespass as between co-owners.*—One tenant in common or joint tenant of land cannot sue his co-tenant in an action of trespass unless the act of the defendant amounts either (1) to the total exclusion or ouster of the plaintiff, or (2) to destructive waste of the common property. For each of the co-tenants is entitled to the possession of the land, to use it in a proper manner, and to take from it the fruits and profits of that user. If one of the owners receives from the common property a larger share of the profits than that to which he is entitled, this is no tort against the other owner, but the proper remedy is an action for an account (z).

### § 49. Trespass *ab initio*

1. He who enters on another's land by authority of law, and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance against that other, is deemed to have entered without authority, and is therefore liable as a trespasser *ab initio* for the entry itself and for all things done by him thereunder which cannot be justified save as done under lawful entry.

2. *Trespass ab initio not limited to trespass to land.*—This rule, which is known as that of trespass *ab initio*, applies not merely to entry upon land, but to all other acts which, unless done by some special authority of law, would have amounted under the old practice

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(y) But only if the defendant is in possession wrongfully. Apparently for that reason the principle does not apply where a tenant is in possession under a lease after a breach of covenant until the landlord determines the lease by some such act as the issue of a writ: *Elliott v. Boynton*, [1924] 1 Ch. 236. But see the criticism of this case by A. T. Denning, 43 L. Q. R. p. 53. See also Blackstone, Comm. iii, 210; *Barnett v. Earl of Guildford* (1855), 11 Ex. 19; *Anderson v. Radcliffe* (1860), 29 L. J. Q. B. p. 128; *Ocean Accident Corporation v. Ilford Gas Co.*, [1905] 2 K. B. 493.

(z) *Jacobs v. Seward* (1872). L. R. 5 H. L. 464; *Murray v. Hall* (1849), 7 C. B. 441. For a full discussion of the rights *inter se* of co-owners of land or chattels, see Lindley, Partnership, pp. 29—36, 10th ed.

to the wrong of trespass whether to the land, goods or person of another: for example, the seizure of cattle damage feasant. If such an authority is subsequently abused by doing a wrongful act under cover of it, it is cancelled *ab initio* or retrospectively and deemed never to have existed, so that the exercise of it becomes actionable as a trespass.

3. *Six Carpenters' Case*.—The leading authority for this doctrine is the case known as the *Six Carpenters' Case*, reported by Coke. There it is said (a): "When an entry, authority, or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*. . . . The law gives authority to enter into a common inn or tavern. . . . But if he who enters into the inn or tavern doth a trespass, as if he carries away anything . . . in these and the like cases the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*."

4. *Effects of the rule*.—The rule is primarily one of procedure, the effect of it under the old practice being that a writ of trespass would lie for the entry or seizure itself, instead of a writ of trespass or of case for the subsequent abuse only. In this respect the rule has now lost its significance; but its secondary effect upon the substantive law still remains—*viz.*, that it enables the plaintiff to recover damages for the entire transaction, and not merely for the wrongful portion of it (b). The rule has been abolished by statute in the case of distress for rent (c) (but not for distress damage feasant) and in certain other instances, and there is no valid reason why it should not now be wholly eliminated from the law (d).

5. *Limits of the rule*.—The rule applies only to acts done in pursuance of an "entry, authority, or license given to any one by the law". "Where an entry, authority, or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*" (e).

(a) (1610), 8 Co. Rep. 146a; Smith, L. C. i, 134.

(b) *Oxley v. Watts* (1785), 1 T. R. 12; *Bagshaw v. Goward* (1605), Cro. Jac. 147.

(c) Distress for Rent Act, 1737, s. 19.

(d) Sir John Salmond said: "It is to be regretted that a legal fiction due to the misplaced ingenuity of some medieval pleader should have thus succeeded in maintaining its existence and oppressive operation in modern law." But the rule was originally designed to provide a remedy against abuses of authority which might lead to the oppression of the subject: Holdsworth, H. E. L., vii, p. 500.

(e) *Six Carpenters' Case* (1610), 8 Rep. 146b.



6. *Does not apply to mere acts of omission.*—The rule applies only when the subsequent abuse amounts to a positive wrongful act, as opposed to a mere omission or non-feasance. Thus, in the *Six Carpenters' Case* itself it was resolved that the defendants were not trespassers *ab initio* merely because they refused to pay for the quart of wine and the pennyworth of bread which they bought and consumed in the plaintiff's inn. For the same reason a sheriff is not a trespasser *ab initio* because he wrongfully omits to discharge at the proper time a prisoner in his custody (f) (g).

7. A lawful entry does not become by abuse a trespass *ab initio*, unless that abuse has reference to and so takes away the entire ground and reason of the entry. If there remains any independent ground or reason of entry, which is unaffected by the abuse, it will suffice to justify the entry and protect it from the rule of trespass *ab initio*. Thus, in *Elias v. Pasmore* (h) police constables lawfully entered premises to arrest one of the plaintiffs and whilst on the premises took possession of a large number of documents, some rightfully, some wrongfully. It was held that they were trespassers only as to the documents which were wrongfully taken, and that they were not liable as trespassers *ab initio* for damage to the premises which they had lawfully entered for the purpose of the arrest.

### § 50. The Measure of Damages in Trespass

1. *Ordinary measure of damages.*—When a trespass has caused physical damage to the land, the measure of damages is the loss

(f) *Smith v. Egginton* (1837), 7 A. & E. 167. Cp. *West v. Nibbs* (1847), 4 C. B. 172.

(g) It has been suggested, in consequence of expressions used in the *Six Carpenters' Case*, that the true distinction is not between misfeasance and non-feasance, but between acts which do and those which do not under the old practice amount to trespass. It is difficult, however, to reconcile such an interpretation with the authorities. To work a horse which has been lawfully seized damage feasant is not in itself a trespass, but it clearly makes the distrainer a trespasser *ab initio*: *Ozley v. Watts* (1785), 1 T. R. 12. Conversely, to remain on premises after the determination of a right of entry is a trespass, and yet it seems the better opinion that it does not amount to a trespass *ab initio*. It is impossible, however, to reconcile all the *dicta* or even all the decisions on this most confused and unsatisfactory branch of law.

(h) [1934] 2 K. B. 164. Cp. *Harvey v. Pockock* (1843), 11 M. & W. 740; *Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417; *Owen and Smith v. Reo Motors* (1934), 151 L. T. 274. If such cases are carried out to their logical consequences, they cut down considerably the doctrine of trespass *ab initio* as it was understood in the time of the *Six Carpenters*. For the strange history of this doctrine, see Ames, Lectures, pp. 61–3; Holdsworth, H. E. L. vii, 498–501, and for the history of the application of the principle in cases of distress, see G. L. Williams in 52 L. Q. R. 106. See also Williams, Animals, pp. 97–100.

thereby caused to the plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement—the cost of restoring the land to the condition in which it formerly was—a cost which may greatly exceed the actual diminution in the value of the land. Thus, if an old building is pulled down the plaintiff cannot recover the cost of putting up a new one, but merely the value of the old (i). Prospective damages can be recovered (k).

2. *Damages recoverable by occupier with limited interest.*—

When a lessee or other person in rightful occupation of land with a limited interest in it sues in trespass, what is the measure of damages? Is it the damage done to his own limited interest, or is it the whole damage done to the land? On this point there seems to be no adequate authority: but it is settled that the bailee of chattels can recover in trespass or trover the whole value of the property, and not merely the value of his interest in it (holding the surplus in trust for the owner or other persons interested in the property) (l); and there seems to be no reason why the occupier of land should be in a different position.

3. *Compensation for beneficial use of land.*—When a trespass consists in some beneficial use wrongfully made of the plaintiff's land, even if it causes no damage the plaintiff is entitled to claim by way of damages a reasonable remuneration for that use, as if it had been had under an agreement; and in this remuneration compensation for any damage done to the land will be included (m). So in the case of the unlawful use of a way over another's land; even though no harm has been done to the land, a reasonable rent for such a way may be recovered as damages (n).

4. *Wrongful severance of chattels.*—When part of the land has been wrongfully severed and turned into a chattel, the value of that chattel is sometimes greater and sometimes less than the resulting

(i) *Lodge Holes Colliery v. Wednesbury Corporation*, [1908] A. C. 823. So also where a building is burnt down by negligence or as a result of a nuisance: *Moss v. Christchurch R. D. Co.*, [1925] 2 K. B. 750..

(k) *Townend v. Askern Coal Co.*, [1934] Ch. 463. *Supra*, s. 35 (l), n. (y).

(l) *Infra*, s. 79. As to trespass to land, see *Twyman v. Knowles* (1853), 13 C. B. 222, but note that the defendant was himself the lessee of the land, and therefore could not be liable except to the extent of the plaintiff's interest.

(m) *Whittham v. Westminster Brymbo Coal Co.*, [1896] 2 Ch. 538.

(n) *Jegon v. Vivian* (1871), L. R. 6 Ch. 742; *Phillips v. Homfray* (1871), L. R. 6 Ch. 770.

diminution in the value of the land. To remove fixtures from a building will probably diminish the value of the building by a greater amount than the fixtures are worth after removal; but coal hewed out of a seam is worth more than it was when *in situ*. In such cases what is the measure of damages—the value of the chattels so taken away, or the resulting diminution in the value of the land?

*Wilful wrongdoing.*—The rule is that in all cases of wilful wrongdoing the plaintiff may elect to claim either the one or the other, and he will of course claim the amount which is the larger in the particular case. He has two alternative causes of action—he may sue either for the injury to the land or for the conversion of the chattel severed and taken away; and the measure of the damages in these two cases is different. The chattel, although it has been severed and made into a chattel by the labour and expenditure of the defendant, nevertheless belongs to the plaintiff, who may recover its full value without making any allowance for the fact that part of that value has been given to it by the defendant.

The value so recoverable is the value of the chattel at the moment when it first becomes a chattel; and if subsequently the defendant has by his labour or expenditure increased its value, the plaintiff has no claim to this addition. So that if coal is wrongfully extracted by the defendant from the plaintiff's land, he is entitled to recover the value of the coal at the pit's mouth, less the cost of drawing and raising it, but without any deduction of the cost of hewing or procuring it (o).

*No wilful wrongdoing.*—This penal rule by which the plaintiff recovers more than his actual loss does not apply where there is no fraud or conscious wrongdoing on the part of the defendant, and where he has been guilty merely of an honest mistake. In such a case the plaintiff cannot recover the value of the chattel, and is entitled to nothing more than his actual loss—*viz.*, the diminution of the value of the land. So that if the plaintiff's coal is severed and taken by mistake as to title or boundaries, the measure of damages is the value of the coal in the seam, as if it had been bought *in situ* by the defendant (p). Whether the penal measure

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(o) *Martin v. Porter* (1839), 5 M. & W. 351; *Taylor v. Mostyn* (1886), 33 Ch. D. 226.

(p) *Jegon v. Vivian* (1871), L. R. 6 Ch. 742; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Peruvian Guano Co. v. Dreyfus Bros.*, [1892] A. C. pp. 173-7; *Townend v. Askern Coal Co.*, [1934] Ch. 463.

of damages applies in the case of negligence as well as in that of fraud is perhaps to be regarded as unsettled. There are certain *dicta* in favour of its application to such a case (q) (r).

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(q) See the cases cited in the preceding note.

(r) These principles have been worked out by the Courts with exclusive reference to the wrongful extraction of coal. The distinction between an innocent and fraudulent defendant is unknown to the law of conversion: *per* Lord Roche in *Caston Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 198. But Sir John Salmond thought that there was no reason to doubt that the principles in question were of general application to all forms of wrongful severance and conversion, citing *Peruvian Guano Co. v. Dreyfus Bros.*, [1892] A. C. p. 176, *per* Lord Macnaghten.

## CHAPTER VII

## DISPOSSESSION OF LAND

## § 51. The Action of Ejectment

1. *Dispossession defined.*—The wrong of dispossession consists in the act of depriving any person entitled thereto of the possession of land. This deprivation of possession may happen in two ways—namely, either by wrongfully *taking* possession of the land, or by wrongfully *detaining* the possession of it after the expiration of a lawful right of possession. In the first case, the wrong of dispossession is also a trespass; in the latter it is not. But so far as regards the essential nature of the wrong and the remedies available for it, there is no difference between one form of dispossession and the other (a).

2. *The action of ejectment.*—Any person wrongfully dispossessed of land may sue for the specific restitution of it in an action of ejectment. This action was in its origin merely a special variety of the action of trespass (whence its full title—*trespass in ejectment*), and was available only for leaseholders. It was the remedy by which a tenant for a term of years recovered the possession of the land either from his landlord or from any other person who had dispossessed him. So greatly, however, did it exceed in convenience and efficiency the remedies available for freeholders, that it came in course of time and by the aid of the most elaborate fictions to be used by freeholders also, superseding all other remedies and becoming the universal means by which the possession of land could be recovered by any person having title to it.

The action when brought by a freeholder was instituted in the name of a fictitious plaintiff, usually called John Doe, who claimed possession of the land under a fictitious lease, which the real claimant (the plaintiff's lessor, as he was termed) was alleged to have granted to him. Hence the name of an action of ejectment

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(a) In the days of Blackstone it was necessary to distinguish between many different forms of dispossession, or ouster as it was called—*viz.*, abatement, intrusion, disseisin, discontinuance, deforcement, dispossession of a leasehold, and so on. Bl. Comm. iii, 167. All these distinctions have become immaterial.

under the old procedure: *Doe on the demise of Robinson v. Johnson*. The defendant was permitted to defend the action only on the terms of admitting the alleged lease and the dispossession of the plaintiff, so that the only question left in issue was the title of the plaintiff's lessor (that is to say, the real plaintiff) to the land in question. These fictions were all swept away by the Common Law Procedure Act, 1852; and by the Judicature Act, 1873, even the term ejectment is superseded by the term action for the possession of land. The older term is, however, conveniently retained in practice (b).

3. *The jus tertii*.—In trespass the defendant cannot successfully set up the *jus tertii*—that is to say, the existence of a title superior to that of the plaintiff and vested in some third person (c). The same rule holds good in an action of ejectment where the defendant has committed a trespass against the plaintiff. If, therefore, the plaintiff is in possession the *jus tertii* will afford the defendant no answer to the action (d). But usually the plaintiff in an action of ejectment is not in possession: he relies upon his right to possession, unaccompanied by actual possession. In such a case, he “must recover by the strength of his own title, without any regard to the weakness of the defendant’s” (e). The general rule, therefore, is that in an action of ejectment the *jus tertii* is a good defence. This is sometimes spoken of as the doctrine of *Doe v. Barnard* (f).

But to this general rule there are two exceptions: (1) Whenever a person has acquired possession through another whose title is defective, he cannot set up this defect against that other or anyone claiming through him (g), but he may show that such title has since expired or been parted with (h). This is an application of the principle of estoppel. The commonest instance is that the lessee is estopped from denying his lessor’s title. (2) Probably, if the

(b) For an account of the history and nature of ejectment under the old practice, see Bl. Comm. iii, 199—207; A. A. L. H. iii. pp. 611—45; Holdsworth, H. E. L. iii, 213—217; vii, 4—23.

(c) *Supra*, s. 48 (3).

(d) *Davison v. Gent* (1857), 1 H. & N. 744. There the defendant took a tortious possession of the premises as a mere intruder and trespasser on the plaintiff. The *jus tertii* was not pleaded. See, however, Hargreaves in 56 L. Q. R. p. 396, n. (3).

(e) *Martin d. Tregonwell v. Strachan* (1749), 5 T. R. 107 n., *per* Lee, C.J., 2 Wms. Saund. p. 359, n. (a). Cp. *Chowood v. Lyall* (No. 2), [1930] 2 Ch. p. 164, *per* Lord Hanworth, M.R.

(f) *Doe d. Carter v. Barnard* (1849), 13 Q. B. 945.

(g) *Doe d. Johnson v. Baytup* (1835), 3 A. & E. 188. See 41 L. Q. R. pp. 161—6.

(h) *Claridge v. MacKenzie* (1842), 4 M. & G. 142.

defendant's possession is wrongful as against the plaintiff, the plaintiff may succeed though he cannot himself show a good title (i).

But possession is *prima facie* evidence of title. If such *prima facie* evidence is not displaced by proof of title in a third person the plaintiff with prior possession will recover. So in *Asher v. Whitlock* (k) where a man inclosed waste land and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who entered upon it without any title. This decision, although long doubtful, may now be regarded as authoritative in consequence of its express recognition by Lord Macnaghten, delivering the advice of the Judicial Committee of the Privy Council in *Perry v. Clissold* (l). But the strictures in the latter case on *Doe v. Barnard* seem inconclusive, and there is nothing in the actual decision in these two cases which is inconsistent with the rule that in general the *jus tertii* is a good defence in ejectment (m).

4. *Ejectment as between co-owners.*—Ejectment will lie at the suit of one joint tenant or tenant in common against the other where the act of the defendant amounts to the total exclusion or ouster of the plaintiff from the possession of the common property (n).

## § 52. The Action for Mesne Profits

1. *Recovery of mesne profits.*—Any person wrongfully dispossessed of land has, in addition to a right of action in ejectment for the recovery of the land, a right of action for damages in respect of all loss suffered by him during the period of his dispossession. Such an action is termed an action for mesne profits.

2. *Mesne profits may be claimed in ejectment.*—A claim for

(i) *Doe d. Hughes v. Dyball* (1829), 3 C. & P. 610; *Davison v. Gent* (1857), 1 H. & N. 744. This exception is, however, doubted by S. A. Wiren, 41 L. Q. R. p. 152, and see Winfield, p. 370; Hargreaves in 56 L. Q. R. pp. 391-2.

(k) (1865), L. R. 1 Q. B. 1.

(l) [1907] A. C. 73.

(m) In neither *Asher v. Whitlock* nor *Perry v. Clissold* was the *jus tertii* pleaded nor could it be pleaded. The *dicta* in the former case to the effect that the *jus tertii* would not be a good defence were *obiter*. But Sir John Salmond (6th ed. pp. 239-40) accepted these *dicta* and the judgment in *Perry v. Clissold* as establishing the doctrine that the *jus tertii* is not a defence. It is not unreasonable to suppose that he might have revised his views on consideration of the fresh examination of the authorities on this topic by Wiren, 41 L. Q. R. 139, and Holdsworth, H. E. L. vii, 57-58. Hargreaves takes a different view of the authorities in 56 L. Q. R. 376 *seq.*, to whom Holdsworth replied: 56 L. Q. R. 479 *seq.*

(n) *Murray v. Hall* (1849), 7 C. B. 441; *Goodtitle v. Tombs* (1770), 3 Wils. 118; Co. Litt. 199b; Common Law Procedure Act, 1852, s. 189. This section is repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3, but the principle remains unaffected. As to trespass between co-owners, *vide supra*, s. 48 (b).

mesne profits is now usually joined with the action of ejectment, this joinder being permitted by the Rules of the Supreme Court, O. 18, r. 2.

3. *Action of mesne profits founded on doctrine of trespass by relation.*—The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; its proper title was the action of trespass for mesne profits. Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land (o). Such a claim was based upon and rendered possible by the doctrine of trespass by relation, which has been already explained in the chapter on trespass (p). To remain wrongfully in possession of land is not, as we have already seen (q), in itself a trespass. But after the plaintiff so kept out of possession has re-entered and recovered his possession, he is remitted by a legal fiction to his former status *ab initio*, and is deemed never to have been out of possession. It then becomes possible for him, therefore, to sue in trespass for all acts that have been done upon the land during the period of his dispossession—including the continued dispossession itself. Hence the action for mesne profits. "That is the ordinary doctrine on which actions for mesne profits are founded; you look to the date of the title, and after entry consider the party entitled to have been then in possession" (r).

4. *Re-entry as a condition precedent to action for mesne profits.*—Since the action for mesne profits was thus founded on the doctrine of trespass by relation, it followed that the action would not lie until after the plaintiff had re-entered and recovered the possession of the land. But this requirement of re-entry as a condition precedent to an action for mesne profits is now abolished to this extent, and to this extent only, that a claim for such profits may in all cases be joined with an action of ejectment; for this is expressly allowed in the case of landlord and tenant by the Common

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(o) Chitty's Precedents in Pleading, 661: "That the defendant broke and entered messuages of the plaintiff situate, etc., and ejected the plaintiff from his possession and occupation thereof, and kept him so ejected for a long time, and during that time took and received to the use of him the defendant all the issues and profits of the said tenements, etc."

(p) *Supra*, s. 48 (4).

(q) *Supra*, s. 47 (5).

(r) *Radcliffe v. Anderson* (1858), E. B. & E. p. 824. Cp. *Litchfield v. Ready* (1850), 5 Ex. p. 944. See also Co. Litt. 257a.



Law Procedure Act, 1852, s. 214, and impliedly in all other cases by the Rules of the Supreme Court, O. 18, r. 2 (s).

The law, then, seems to be as follows: A person dispossessed of land may—

- (a) Sue in ejectment and for mesne profits in one action;
- (b) Sue for mesne profits, if he has already got back into possession either by means of an action of ejectment or otherwise;
- (c) Sue for mesne profits without ejectment and without recovery of possession, if his interest in the land has already come to an end (t).

5. *Measure of damages.*—In an action for mesne profits (notwithstanding the name of the action) the plaintiff is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost. He recovers all the loss which has resulted from the dispossession (u).

6. *Right to set off value of improvements.*—It seems not to have been decided whether a defendant in an action for mesne profits can set off the value of improvements made by him to the property in good faith during the period of his possession (x). Since, however, the plaintiff's claim is for the loss suffered by him in consequence of the dispossession, it would seem clear on principle that he must take into account the value to himself of the improvements made by the defendant. If the defendant has pulled down an old house and built a new one, it can scarcely be supposed that the plaintiff can recover both the new house in an action of ejectment and the value of the old one in an action for mesne profits.

(s) *Dunlop v. Macedo* (1891), 8 T. L. R. 43.

(t) 2 Roll. Abridg. 550.

(u) *Goodtitle v. Tombs* (1770), 3 Wils. p. 121; *Dunn v. Large* (1783), 3 Doug. 335. But for a possible exception see *Elliott v. Boynton*, [1924] 1 Ch. 236, criticised by A. T. Denning in 43 L. Q. R. 53.

(x) See Mayne, *Damages*, p. 436 (10th ed.). Such a set-off is allowed in America. See Sedgwick, *Damages*, §§ 915-17 (9th ed.).

## CHAPTER VIII

## NUISANCE

## § 53. The Nature of Nuisance

1. *Public and private nuisances.*—Nuisances are of two kinds, public and private. A private nuisance is a civil wrong, the nature of which we are about to consider. A public or common nuisance is a criminal offence, which has been defined as “an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty’s subjects” (a). Examples of a public nuisance are keeping a common gaming-house or a disorderly inn, publicly selling unwholesome provisions, obstructing a highway, or making it dangerous for traffic.

Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one’s trees to overhang the land of a neighbour (b). A public nuisance falls within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus, the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is also a tort actionable at his suit (c).

2. *Two kinds of private nuisances.*—Private nuisances are themselves of two kinds—*viz.*, (a) any wrongful disturbance of an easement or other servitude appurtenant to land, and (b) the act

(a) Stephen’s Digest of Criminal Law, art. 255 (7th ed.).

(b) But in early times the distinction between public and private nuisances was not grasped. So we find various criminal proceedings at the Norwich leets in respect of what would now be regarded as private nuisances. See Selden Society, Vol. V, pp. 8, 28, 45, 51 and 56. And at the present day there is much in common between a private nuisance and those public nuisances for which an individual has in certain circumstances a remedy. So much is this the case that in *Betts v. Penge U. D. C.*, [1942] 2 K. B. 154, a Divisional Court held that the removal of window-sashes, thereby interfering with the personal comfort of the occupiers of a flat, was a statutory nuisance under s. 92 of the Public Health Act, 1936. This (as Landon has pointed out, 58 L. Q. R. p. 415) is an unwarranted extension of criminal sanctions into the sphere of civil obligations. See also Winfield, p. 480.

(c) *Infra*, s. 69.

of wrongfully causing or allowing the escape of deleterious things into another person's land—for example, water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, disease-germs, animals, and vegetation (d) (e).

Sir John Salmond distinguished nuisance in the strict sense as he called it from disturbance of a servitude, and stated that these were not in reality two species of the same generic injury, but two different injuries which happened to be called by the same name. He did not think it possible to include them within any single definition, and treated of them in different chapters (f).

(d) The explanation of this threefold meaning and application of the term nuisance is that in its origin the term was merely a generic expression meaning wrongful harm, and that although it has now lost this wide signification it has failed to attain instead any single specific application. The term is derived, through the French, from the late Latin *nocentia*: see Tertull. *Apol.* cap. 40—*Deus innocentiae magister nocentiae iudex*. Chaucer used it in this generic sense: "Helpe me for to weye ageyne the fecnde. . . . Keepe us from his nuisance." (Mother of God, I, 21.) Nuisance appears in the old Latin pleadings as *nocumentum*—i.e., harm. The terms trespass and tort, though similarly generic in their original use, have been more successful in the process of specification. On the "ambiguity, the vagueness, and the broadness of the term nuisance"; see Jeremiah Smith in 30 H. L. R. p. 325 (note), Harvard Essays, p. 204 (note).

(e) The following cases illustrate the different kinds of nuisance:—

ANIMALS: *vide infra*, s. 148 (5).

SMELL: *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588 (stables).

NOISE: *Christie v. Davey*, [1893] 1 Ch. 316 (music to annoyance of neighbours); *Polsue & Alfieri, Ltd. v. Rushmer*, [1907] A. C. 121 (machinery).

DUST: *Andreae v. Selfridge*, [1938] Ch. 1 (rebuilding operations).

DISEASE GERMS: *Metropolitan Asylums District Board v. Hill* (1882), 47 L. T. 29; *Att.-Gen. v. Nottingham Corporation*, [1904] 1 Ch. 673.

HEAT: *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685 (cooking-stove a nuisance to adjoining wine cellar).

FUMES: *Manchester Corporation v. Farnworth*, [1930] A. C. 171 (fumes from electric generating station ruining trees and grass).

WATER: *Broder v. Saillard* (1876), 2 Ch. D. 692 (moisture from artificial mound of earth on defendant's land injurious to adjoining house); *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. 680 (overflow of water from artificial watercourse).

ELECTRICITY: *Eastern & South African Telegraph Co. v. Cape Town Tramways Companies*, [1902] A. C. 861 (escape of electricity from electric tramways preventing working of a submarine cable).

POLLUTION OF WATER: *vide infra*, s. 65.

VIBRATIONS: *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (steam-engines causing discomfort to residents in adjoining house and structural damage to house); *Hoare v. McAlpine*, [1923] 1 Ch. 167 (pile-driving).

VEGETATION: *Smith v. Giddy*, [1904] 2 K. B. 448 (trees spreading branches beyond boundary); *Butler v. Standard Telephones*, [1940] 1 K. B. 399 (roots of trees causing soil to sink through abstraction of water).

In *Victoria Park Racing Co. v. Taylor* (1937), 58 C. L. R. 479, the High Court of Australia held that it was not a nuisance to broadcast a description of horse-races from adjoining land, and the Judicial Committee of the Privy Council refused leave to appeal (*The Times*, January 20, 1938). See 54 L. Q. R. p. 319.

(f) So Farwell, J., in *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. p. 87, said: "There are many kinds of nuisance actions" and that a pollution action was a "nuisance action of a kind peculiar to itself". And Maugham, J., in *Price v. Hilditch*, [1930] 1 Ch. p. 507, a light case, said that in such cases "nuisance" must be "used in a somewhat artificial sense, because nuisance arising from the

The generic conception involved in nuisance may, however, perhaps be found in the fact that all nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as occupier of such land (g). The basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*: a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour (h).

Moreover, this is historically correct. The earliest remedies for nuisance were the assize of nuisance and the writ of *quod permittat prosternere* to authorise the plaintiff to abate the nuisance. These actions were only available for and against freeholders and gave way to the action of case. The assize of nuisance had been a real action; the action of case retained its local character (i). That this local character still adheres to the action is shown by such cases as *Malone v. Laskey* (k) where a cistern, owing to vibrations caused by an engine on adjoining premises, fell upon and injured the wife of the occupier of some premises, and it was held that she could not recover because she had neither a proprietary nor a possessory interest in the premises. The action of nuisance is still given to a man *qua* owner of land or of rights in connection with land (l) (m).

deprivation of light of a house is not at all like nuisance from noise or smell". Cp. *Fishenden v. Higgs and Hill* (1935), 153 L. T. p. 143. Even within the limits of nuisance by the escape of deleterious things Lord Maugham said that the legal duty of the owner of land to an adjoining owner might be very different in different cases: *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 888.

(g) Sir John Miles in Dig. § 857. Winfield's definition in 4 Camb. L. J. p. 190 is very similar. Cp. *Cunard v. Antifyre*, [1933] 1 K. B. pp. 556-7, *per* Talbot, J.

(h) Brian, C.J., in (1480), Y. B. 20 Edw. IV, 11, pl. 10; *Aldred's Case* (1611), 9 Rep. f. 59a; Holt, C.J., in *Tenant v. Goldwin* (1705), 2 Ld. Raym. 1089; Lord Atkin in *Sedleigh-Denfield's Case*, *supra*, p. 898. This maxim was, however, described by Holmes as an "empty general proposition which teaches nothing but a benevolent yearning": Harvard Essays, p. 164, 8 H. L. R. p. 3, Collected Papers, p. 120; by Lord Wright in *Sedleigh-Denfield's Case*, *supra*, p. 903, as not only lacking in definiteness but also inaccurate; and by Erle, J., in *Bonomi v. Backhouse* (1858), E. B. & E. p. 643, as "mere verbiage".

(i) *Warren v. Webb* (1808), 1 Taunt. 379; *Sedleigh-Denfield's Case*, *supra*, p. 902. See Holdsworth, H. E. L., iii, pp. 11 and 27-8; Winfield in 4 Camb. L. J. pp. 190-2.

(k) [1907] 2 K. B. 141. Followed in *Metropolitan Properties v. Jones*, [1939] 2 A. E. R. 202. But see below, s. 134 (5).

(l) It is probably owing to the proprietary as opposed to the delictual character of the action that the liability under it is not dependent on negligence, *vide infra*, s. 137 (4).

(m) In *Wing v. L. G. O. C.*, [1909] 2 K. B. pp. 665-6, Fletcher Moulton, L.J., assimilated the law of public nuisance to the rule in *Rylands v. Fletcher*, *infra*,

If we take this wider conception of the generic character of nuisance we are spared the necessity of recourse to the rather artificial treatment of noises, smells, vibrations, etc., as "things" which are allowed to escape. They are not the subject of property. Property may be had in the thing which makes the noise or vibration or smell, but not in the noise, smell, or vibration itself (n). Sir John Salmond's dichotomy of nuisance seems to create at least as great a difficulty as it evades.

8. *Nuisance commonly a continuing injury.*—Nuisance is commonly a continuing wrong—that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff's land (e.g., a stream of foul water, or the constant noise or smell of a factory) (o). An escape of something on a single occasion, however harmful and wrongful (e.g., the escape of water from the bursting of a reservoir), would not in common speech be termed a nuisance. This distinction, however, is not one which admits or requires any legal recognition for the purposes of the law of nuisance. All wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law; for they are all governed by the same principles (p).

Ch. xvii, which he described as applying to a "class of actions arising out of cases where by an excessive use of some private right a person has exposed his neighbour's property or person to danger", and said that "while the best known cases of this type are associated with the use by a person of land belonging to him . . . analogous causes of action exist when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic". This, if applied to private nuisances, would give a generic conception to cover public and private nuisances. Cp. Bohlen, *Studies*, pp. 411-16.

(n) See also s. 61 (4). Cp. Pollock, 39 L. Q. R. 145. But in support of Salmond's view, compare the treatment of vibrations as a "physical invasion" upon property in New York: Jeremiah Smith in 33 H. L. R. p. 546, *Harvard Essays*, pp. 618-20.

(o) "Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property": *per* Talbot, J., in *Cunard v. Antifyre*, [1938] 1 K. B. p. 557. Cf. Lord Wright in *Sedleigh-Denfield's Case*, *supra*, pp. 908-4.

(p) The difference in question is not one that admits of being so defined as to serve as the basis of any legal distinction, for it is in reality nothing more than an indeterminable difference in degree. If we were to define a nuisance as the continuing escape of deleterious things, how long would this continuance have to last in order to constitute a nuisance rather than some other kind of wrong? The stream of water that escapes from a bursting reservoir is continuing for a certain time, and it is governed by the same rules of liability, however long or short a time it lasts. In *Midwood v. Mayor of Manchester*, [1905] 2 K. B. 597, damage done to the plaintiff's premises by an explosion of gas in the adjoining highway

4. *Who can sue for a nuisance.*—A private nuisance, like trespass (*q*), is actionable only at the suit of him who is in possession of the land injuriously affected by it. A reversioner has no cause of action unless he can prove a permanent injury to his proprietary right (*r*). Nor can a person who has merely the use of land, without either the possession of it or any proprietary interest in it, sue for a nuisance, even though he has suffered direct personal or pecuniary damage (*s*). There seems no reason why possession without title should not as a general rule be sufficient to enable a plaintiff to succeed in nuisance so that the *jus tertii* cannot be set up as a defence (*t*). But in the case of disturbances of a servitude special considerations arise which we shall deal with later (*u*).

5. *Nuisance and trespass distinguished.*—The true relation between nuisance and trespass would seem to be that these wrongs are mutually exclusive, and not partially coincident. Nothing is to be rightly classed as a nuisance if it is really a trespass (*v*). The chief importance of the distinction is that trespass is actionable *per se*, while nuisance (except in the case of nuisances consisting of injuries to servitudes (*w*)) is actionable only on proof of actual damage (*x*).

The test of the distinction is whether under the old practice a writ of trespass would have been available, or only a writ of case (*y*); and this depends on whether the injury is or is not a direct act of physical interference with the plaintiff's land (*z*).

was held to be caused by a nuisance within the meaning of that term as used in an Act of Parliament. Cp. s. 54 (5), *infra*. But the American Courts still regard only an abiding or continuous injury as a nuisance; Bohlen, *Studies*, p. 418.

(*q*) *Supra*, s. 48 (1). Presumably, however, the doctrine of trespass by relation, *supra*, s. 48 (4), extends by analogy to the wrong of nuisance.

(*r*) See, for a fuller discussion of the matter, s. 86, *infra*.

(*s*) *Supra*, s. 34 (3). *Aliter* in the case of public nuisances.

(*t*) See Winfield, pp. 513-4, and, more fully, *infra*, s. 58 (7).

(*u*) *Infra*, s. 58 (7).

(*v*) Cp. Slessor, L.J., in *Matania v. National Provincial Bank*, [1936] 2 A. E. R. p. 647; Winfield, pp. 514-6. See, however, Pollock, *Torts*, 819.

(*w*) *Nicholls v. Ely Beet Sugar Factory*, [1936] Ch. 343.

(*x*) *Supra*, s. 47 (3); *infra*, s. 54 (1).

(*y*) *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. p. 6, *per* Scrutton, L.J.; *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. p. 86, *per* Farwell, J.

(*z*) *Supra*, s. 2 (1). It is true, indeed, that in the old practice the remedies of trespass and case were in certain instances concurrent, the plaintiff having an option to sue in either form of action; and in this sense and to this extent it may be said that trespass and nuisance were coincident and overlapping species of injuries. As already indicated, however (*supra*, s. 2 (2), n. (*k*)), these cases of concurrence between trespass and case were anomalous and illogical. They may, and indeed must, be disregarded in any attempt at logical classification and definition in modern law.

### § 54. Damage Caused by Nuisance

1. *No nuisance without damage.*—No action will lie for a nuisance (other than one consisting of an injury to a servitude (a)) unless it is the cause of actual damage to the plaintiff (aa). No man is bound to prevent the escape from his land of things which do no harm. Thus, no action will lie against him who allows the branches of his trees to overhang his neighbour's land, or their roots to grow into his neighbour's soil, unless actual damage is thereby caused (b). The adjoining occupier should protect himself against such an invasion by cutting the branches or roots which project beyond the boundary; and this he may do, even though they are doing him no harm (c). A trespass, on the contrary, is actionable *per se*.

2. *Kinds of damage sufficient.*—The damage that is sufficient to found an action of nuisance may consist either in (1) some physical injury to the premises occupied by the plaintiff, or to the property of the plaintiff situated thereon, or (2) some interference with the beneficial use of these premises. Any substantial interference with the comfort or convenience of persons occupying or using the premises is a sufficient interference with the beneficial use of them within the meaning of this rule.

3. *Nuisance causing discomfort.*—When an action of nuisance is based on mere discomfort or inconvenience, this discomfort or inconvenience must be substantial—that is to say, it must not be merely trifling or fanciful or such as an average and reasonable man is content to submit to. *De minimis non curat lex*. The rule is well expressed by Knight-Bruce, V.-C., in *Walter v. Selfe* (d): “Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and

(a) *Nicholls v. Ely Beet Sugar Factory*, [1936] Ch. 343; see R. W. G. Holdsworth in 52 L. Q. R. 463, and Cl. & L. pp. 114-6.

(aa) *Contra*, Macnaghten, J., in *Hollywood Fox Farm v. Emmett*, as reported in [1936] 1 A. E. R. p. 831.

(b) *Smith v. Giddy*, [1904] 2 K. B. 448. It is possible, however, that in such a case damage might be presumed: cp. *Baten's Case* (1610), 9 Rep. 53b; Halsbury, xxiv, p. 21. It appears from *Smith v. Giddy* that liability attaches in the case of trees of native growth as well as those planted by the defendant: see Noel in 56 H. L. R. pp. 777-8. *Contra*, Beven, pp. 513-5.

(c) *Lemmon v. Webb*, [1895] A. C. 1.

(d) (1851), 4 De G. & Sm. p. 322; cp. *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. pp. 165-6, *per* Luxmoore, J.

habits of living, but according to plain and sober and simple notions among the English people? ” (e). But the law judges by no Spartan standards. The loss of even one night’s rest is no trivial matter (f).

4. *The standard of comfort.*—The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives. He who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships. Thus, in *Sturges v. Bridgman* (g), Thesiger, L.J., said: “What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey”. In *Polsue & Alfieri v. Rushmer* (h) this doctrine of the local standard of comfort was definitely accepted by the Court of Appeal and the House of Lords (i).

But “in cases of nuisance by obstruction of ancient lights the question of locality has very much less to do with it than in cases relating to other nuisances” (k). Russell, J., in *Horton’s Estate v. Beattie* (l) even went so far as to say that “the standard of light required to be left so as to prevent a nuisance is an absolute one. The human eye requires as much light for comfortable reading or sewing in Darlington Street, Wolverhampton, as in Mayfair”. But in saying this he went too far. “A reasonable person would not expect precisely as much light in Mayfair as he would get in the

(e) For instances in which the discomfort alleged was too trivial to amount to nuisance, see *Christie v. Davey*, [1893] 1 Ch. 316; *Gaunt v. Fynney* (1872), L. R. 8 Ch. 8; *Heath v. Mayor of Brighton* (1908), 24 T. L. R. 414.

(f) *Andreae v. Selfridge*, [1937] 3 A. E. R. p. 261, per Greene, M.R.

(g) (1879), 11 Ch. D. p. 865.

(h) [1906] 1 Ch. 234; [1907] A. C. 121.

(i) See also *St. Helens Smelting Co. v. Tipping* (1865), 11 H. L. C., per Lord Westbury at p. 650, and per Lord Cranworth at p. 653; *Colls v. Home and Colonial Stores*, [1904] A. C. at p. 185, per Lord Halsbury. The lowering of the standard of comfort in particular localities does not depend on the existence of prescriptive rights to create nuisances there: *Rushmer v. Polsue & Alfieri*, [1906] 1 Ch. at p. 251, per Cozens-Hardy, L.J.

(k) *Fishenden v. Higgs and Hill* (1936), 153 L. T. 128, p. 140, per Romer, L.J.

(l) [1927] 1 Ch. 75.



country, and he would not expect precisely so much light in the City of London as he would get in Mayfair" (*m*).

The rule that the standard is determined by the locality where the nuisance is created is limited to those cases where the nuisance complained of is productive of sensible personal discomfort. It has never applied where the nuisance complained of consists of material injury to property (*n*).

5. *Temporary nuisance*.—The temporary nature of the inconvenience or discomfort is a fact to be taken into account in judging whether it is sufficiently substantial to amount to a nuisance (*o*). But if it is otherwise substantial, it is none the less a nuisance because it is merely temporary, evanescent, fleeting or occasional (*p*).

6. *Prospective damage not sufficient*.—The damage complained of in an action of nuisance must be actual and not merely prospective. Till damage is caused there is no nuisance, only the potentiality of a nuisance (*q*). Thus, a noisy or offensive factory is not a nuisance actionable at the suit of the owner of an unoccupied piece of building land adjoining it. It does not become a nuisance until the plaintiff actually builds a dwelling-house or other building on his land and the prospective discomfort becomes a present reality (*r*).

7. *Damage due to abnormal sensitiveness*.—No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences. Every person is entitled to do on his own land anything that does not interfere with other persons in the ordinary enjoyment of life or the ordinary modes of using property. In other words, his neighbours have a right to the ordinary conditions of comfortable existence, and to the ordinary conditions of the beneficial use of property;

(*m*) *Fishenden v. Higgs* (1935), 153 L. T. p. 140, *per* Romer, L.J.

(*n*) *St. Helens Smelting Co. v. Tipping* (1865), 11 H. L. C. 642; *Hoare v. McAlpine*, [1923] 1 Ch. 167.

(*o*) *Harrison v. Southwark Water Co.*, [1891] 2 Ch. 409; *Matania v. National Provincial Bank*, [1936] 2 A. E. R. p. 644.

(*p*) *Fritz v. Hobson* (1880), 14 Ch. D. p. 556; *Bamford v. Turnley* (1862), 3 B. & S. p. 84; *Newman v. Real Estate Corporation* (1939), 162 L. T. pp. 189-90.

(*q*) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. pp. 896, 919-20.

(*r*) *Sturges v. Bridgman* (1879), 11 Ch. D. 852.

but they have a right to nothing more. Extraordinary and special requirements are not protected by the law of nuisance. If a man is morbidly sensitive to noise, so that he is prevented from working or sleeping by noises which would not annoy other people, this is indeed substantial damage inflicted upon him, but is not actionable as a nuisance. Similarly, the law of nuisance does not guarantee to a sick man any further exemption from the noise of traffic in the street than it guarantees to him who is well (s).

So if I carry on a manufacture or other business which is so sensitive to adverse influences that it suffers damage from smoke, fumes, vibrations, or heat, which would in no way interfere with the ordinary occupation of land, the law of nuisance will not confer upon me any such special and extraordinary protection. I must acquire immunity from damage of this sort by special contract with my neighbours. "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure" (t). Thus in *Robinson v. Kilvert* (u) the plaintiff could not recover for damage done by the heat from the defendants' pipes to his stock of brown paper—"an exceptionally delicate trade"—since it would not have prejudicially affected any ordinary trade (v).

In its application to those nuisances which consist in interference with health or comfort this rule is easy of application; the requirements of the average man form a definite standard and test of the rights of the plaintiffs. The application of the same rule to nuisances of other kinds, however, is likely to prove a matter of some difficulty. By what test are we to distinguish between ordinary and exceptional requirements for the beneficial occupation of land?

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(s) So knowledge of the abnormality of the plaintiff is relevant in determining the existence of negligence: *Bourhill v. Young*, [1943] A. C. 92; *infra*, s. 120 (4); but it does not make the damages too remote once a cause of action is established; *supra*, s. 34 (17).

(t) *Eastern and South African Telegraph Co. v. Cape Town Tramways*, [1902] A. C. p. 393 (a case on the rule in *Rylands v. Fletcher*). Kekewich, J., took a different view in *National Telephone Co. v. Baker*, [1893] 2 Ch. p. 202, and see Charlesworth, p. 186.

(u) (1889), 41 Ch. D. 88. Contrast the dictum of Page Wood, V.-C., in *Cooke v. Forbes* (1867), L. R. 5 Eq. p. 173, explained in *Robinson v. Kilvert*, *supra*, p. 96. The question is discussed in *Hoare & Co. v. McAlpine*, [1923] 1 Ch. 167 (very old but not abnormally unstable house).

(v) In *Hollywood Silver Fox Farm v. Emmett*, [1936] 2 K. B. 825, it was held that the owner of a silver fox farm had a remedy, but in that case the damage was intended.

### § 55. Ineffectual Defences

1. *Coming to the nuisance.*—It is now settled that it is no defence that the plaintiff himself came to the nuisance. It was, indeed, at one time supposed that no one could complain of a nuisance if with full knowledge of its existence he chose to become the owner or occupier of the land affected by it: as if he knowingly took a house close to a noisy factory. This, however, is not the law. The maxim *Volenti non fit injuria* is capable of no such application (*w*).

2. *Public benefit.*—It is no defence that the nuisance, although injurious to the individual plaintiff, is beneficial to the public at large. A nuisance may be the inevitable result of some manufacture or other operation that is of undoubted public benefit—a benefit that far outweighs the loss inflicted upon the individual—but it is an actionable nuisance none the less. No consideration of public utility can be suffered to deprive an individual of his legal rights without compensation (*x*).

3. *Suitable place.*—Nor is it any defence that the place from which the nuisance proceeds is a suitable one for the purpose of carrying on the operation complained of, and that no other place is available in which less mischief would result. If no place can be found where such a business will not cause a nuisance, then it cannot be carried on at all, except with the agreement of adjoining proprietors or under the sanction of an Act of Parliament (*y*). This rule, however, is to be read in the light of the principle already considered (*z*) to the effect that the test of a nuisance causing personal discomfort is the actual local standard of comfort, and not an ideal and general standard.

4. *Care and skill.*—“Negligence is not a necessary condition of a claim for nuisance” (*a*). Nuisance is not a branch of the law of negligence (*b*). In the case of continuing nuisances, where the defendant himself or some one for whom he is responsible has

(*w*) *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134; *Bliss v. Hall* (1838), 4 Bing. N. C. 183; *Sturges v. Bridgman*, *supra*.

(*z*) See, for example, *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. p. 316; and *supra*, s. 36 (11).

(*y*) *St. Helens Smelting Co. v. Tipping* (1865), 11 H. L. C. 642; *Bamford v. Turnley* (1860), 3 B. & S. 62.

(*z*) *Supra*, s. 54 (4).

(*a*) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 904, *per* Lord Wright. Cp. Lord Atkin at pp. 896–7, Lord Porter at p. 920.

(*b*) *Cunard v. Antifyre*, [1933] 1 K. B. p. 558, *per* Talbot, J.

created the nuisance, it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance (c), though the exercise of reasonable care to prevent annoyance may, as we shall see (d), be relevant in determining whether a nuisance arising in the course of the ordinary user of land is actionable. If an operation cannot by any care and skill be prevented from causing a nuisance, it cannot lawfully be undertaken at all, except with the consent of those injured by it or by the authority of a statute. Thus, it is an actionable nuisance at common law to run a locomotive engine which cannot by any skill in construction or care in management be prevented from discharging sparks; and in the absence of statutory authority he who does so is liable for the consequences, however careful he may have been to prevent them (e).

But where the defendant or some one for whom he is responsible has not created the nuisance different considerations arise of which we shall treat later (f). However in these cases also, even when negligence is relevant, it "is not an independent cause of action but is ancillary to the actual cause of action, nuisance" (g).

5. *Contributory acts of others.*—It is no defence that the act of the defendant would not amount to a nuisance unless other persons acting independently of him did the same thing at the same time (h). Thus, if twenty factories pour out smoke and fumes into the atmosphere, the contribution of each may be so small and its detrimental effect so inappreciable that it does not *per se* amount to a nuisance. Yet the aggregate quantity may be the cause of serious harm or discomfort. In such a case each of the contributors is liable for a nuisance and for his own proportion of the total damage.

6. *Reasonable use of property.*—In the case of nuisance caused

(c) *Rapier v. London Tramways Co.*, [1893] 2 Ch. p. 599, *per* Lindley, L.J. *Cp. Moss v. Christchurch R. D. Co.*, [1925] 2 K. B. 750; *Ware v. Garston Haulage Co.*, [1944] K. B. 30 (unlighted vehicle left on highway), with which contrast *Maitland v. Raisbeck*, [1944] K. B. 689, *infra*, s. 57 (2).

(d) *Infra*, s. 55 (6).

(e) *Jones v. Festiniog Ry.* (1868), L. R. 3 Q. B. 793; *Powell v. Fall* (1880), 5 Q. B. D. 597. So damages are recoverable as well for the damage which is done before as that done after the defendant knows that harm is being done: *Bell v. Twentyman* (1841), 1 Q. B. 766.

(f) *Infra*, s. 57 (2)—(5).

(g) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 904.

(h) *Lambton v. Mellish*, [1894] 3 Ch. 163. *Cp. Sadler v. G. W. Ry.*, [1896] A. C. 450. There is no joint liability in such cases: each is severally liable for his own act.

by the escape of deleterious things (i), he who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property (k). "If a man creates a nuisance", said Kekewich, J. (l), "he cannot say that he is acting reasonably. The two things are self-contradictory."

*Nuisance in course of ordinary user of land.*—But "a balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with" (m). Therefore there is an exception to the general rule in the case of acts reasonably done which are necessary for the common and ordinary use of land and houses.

In *Bamford v. Turnley* (n), Bramwell, B., said: "Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently (o) done, without subjecting those who do them to an action. . . . It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live". Instances given by Bramwell, B., of such non-actionable nuisances were the burning of weeds, emptying cess-pools and making noises during repairs. So if a man pulls down his house for the purpose of building a new one he causes considerable inconvenience to his next-door neighbours during the process of demolition, but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance by the works of demolition (p).

(i) Contrast injuries to servitudes, e.g., *Mayor of Bradford v. Pickles*, [1895] A. C. 587, *supra*, s. 6 (3).

(k) *Bamford v. Turnley* (1862), 3 B. & S. 66; *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685; *Broder v. Saillard* (1876), 2 Ch. D. p. 701, *per* Jessel, M.R.; *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. p. 166, *per* Luxmoore, J. See, however, the observations of Buckley, J., in *Sanders-Clark v. Grosvenor Mansions Co.*, [1900] 2 Ch. 373, and *Jones v. Powell* (1828), Palm. 536; Hutton 135.

(l) *Att.-Gen. v. Cole*, [1901] 2 Ch. p. 207. *Cp. Scott v. Firth* (1865), 4 F. & F. p. 351, *per* Blackburn, J.

(m) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 903, *per* Lord Wright.

(n) (1862), 3 B. & S. 62, at pp. 83-4. *Cp. Goddard, L.J.*, in *Metropolitan Properties v. Jones*, [1939] 2 A. E. R. p. 205.

(o) I.e., using all reasonable care and skill.

(p) *Andreae v. Selfridge*, [1938] Ch. pp. 5-6, *per* Greene, M.R. *Cp. Harrison v. Southwark Water Co.*, [1891] 2 Ch. pp. 413-4, *per* Vaughan Williams, L.J.; *Ball v. Ray* (1873), L. R. 8 Ch. p. 469.

7. *Malicious nuisance*.—But in these cases “reasonable” must be understood in a subjective as well as an objective sense. Therefore if acts otherwise justified on the ground of reciprocity are done wantonly or maliciously the basis of the defence is gone and the defendant cannot use the plea to shield his wanton or malicious conduct. So in *Christie v. Davey* (q), North, J., granted an injunction against hammering and the beating of trays against a party wall and other noises which were maliciously intended to cause discomfort to the occupier of the adjoining house, although, had they been made for a legitimate purpose, the discomfort would not have been sufficiently substantial to be actionable, or at any rate to give grounds for an injunction. Similarly in *Hollywood Silver Fox Farm, Ltd. v. Emmett* (r), Macnaghten, J., granted damages and an injunction when the defendant ordered his son to fire guns on his own land as near as possible to the plaintiffs’ breeding pens in order that the latter’s vixen might refuse to breed or miscarry, though clearly he was entitled to shoot on his own land to keep down rabbits or for pleasure. These cases at first sight seem inconsistent with the general principle that the presence of malice does not render that actionable which without malice would not have been actionable (s). But the inconsistency is apparent rather than real. Malice negatives the excuse as in defamation malice destroys the privilege of the occasion (t).

### § 56. The Legalisation of Nuisances by Prescription

1. *Nuisances legalised by twenty years’ prescription*.—The right to commit a private nuisance may be acquired by prescription. In order to establish such a claim the defendant must show that in doing the acts complained of he was acting openly and to the knowledge of the owner of the servient tenement. So in *Liverpool Corporation v. Coghill* (u) Eve, J., held that the defendants had not acquired a right to discharge borax into sewers to the damage of the plaintiffs’ sewage farm, since the discharge was secret (being by night) and was unknown to the plaintiffs. Subject to these

(q) [1893] 1 Ch. 316.

(r) [1936] 2 K. B. 468; more fully reported [1936] 1 A. E. R. 825.

(s) *Supra*, s. 6 (3).

(t) *Vide infra*, s. 108. Cp. Goodhart in 52 L. Q. R. p. 460, 53 L. Q. R. p. 3; Winfield, pp. 487–9. Holdsworth, 53 L. Q. R. 1, and Landon, in Pollock, p. 325, n. (f), disapprove of the *Hollywood Fox Farm Case*. Mr. Landon does not consider it possible to reconcile the decision with the dicta in *Mayor of Bradford v. Pickles*, [1895] 1 Ch. pp. 157 (Lord Herschell), 159 (Lindley, L.J.); [1895] A. C. pp. 594 (Earl of Halsbury, L.C.), 601 (Lord Macnaghten).

(u) [1918] 1 Ch. 307.

conditions, after a nuisance has been continuously in existence for twenty years, a prescriptive right to continue it is acquired as an easement appurtenant to the land on which it exists. On the expiration of this period the nuisance becomes legalised *ab initio*, as if it had been authorised in its commencement by a grant from the owner of the servient land (*w*).

2. It is not sufficient, however, that the operations of the defendant which now cause the nuisance have been continued for the space of twenty years; they must have been a nuisance for that period. The time runs, not from the day when the cause of the nuisance began, but from the day when the nuisance began. In *Sturges v. Bridgman* (*x*) the defendant had for more than twenty years used certain heavy machinery in his business as a confectioner. His premises adjoined the lower end of the garden of the plaintiff, a physician. Some short time before the action the plaintiff built a consulting room at the foot of his garden, and then found that in the use of it he was seriously inconvenienced by the noise of the defendant's machinery. The defendant pleaded a prescriptive right, but the defence was held insufficient, because there had been no actual nuisance until the erection of the plaintiff's consulting room, and until then he had had no right of action (*y*).

3. It follows from the same principle that the nuisance must for twenty years have been a nuisance to the plaintiff or his predecessors in title, and that it is not enough that it has been for that period a nuisance to other people in the occupation of other property. The right can be acquired only against specific property, not against all the world. A noisy or noisome factory may have been for twenty years a nuisance to the house of A, and may yet remain actionable as a nuisance to the newly erected house of B.

4. *Public nuisances not legalised by prescription.*—No public nuisance can be legalised by prescription. Thus, no operation which constitutes a nuisance to a highway can become lawful by any lapse of time (*z*). "Once a highway always a highway" (*a*). Nor

(*w*) *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134; *Bliss v. Hall* (1838), 4 Bing. N. C. 183; *Sturges v. Bridgman* (1879), 11 Ch. D. 852; *Ball v. Ray* (1873), L. R. 8 Ch. 467; *Provender Millers v. Southampton C. C.*, [1940] Ch. 131, 135.

(*x*) (1879), 11 Ch. D. 852.

(*y*) See also *Ball v. Ray* (1873), L. R. 8 Ch. 467; *Liverpool Corporation v. Coghill*, [1918] 1 Ch. 307.

(*z*) 2 Roll. Abridg. 265; *R. v. Cross* (1812), 3 Camp. 224.

(*a*) *Per Joyce, J.*, in *Harvey v. Truro R. D. C.*, [1903] 2 Ch. p. 644.

where the right claimed is in contravention of a statutory prohibition can it be legalised by prescription (b).

### § 57. The Incidence of Liability for Nuisances

1. Hitherto we have assumed throughout that the person liable in every case is the occupier of the land on which the cause of the injury exists. But although it is generally the occupier who is the defendant in an action of nuisance, this is not always the case, and we have now to deal with the matter more definitely.

Since the decision of the House of Lords in *Sedleigh-Denfield v. O'Callaghan* (c) it is possible to make a coherent statement of the law on this topic with some degree of confidence. It now seems clear that there is no difference in this respect between claims for private nuisance and claims for private damage resulting from public nuisance (d), and the law has gained in clarity. Earlier authorities which are inconsistent with *Sedleigh-Denfield's Case* can now be disregarded, and those which go counter to the reasoning behind that decision can now carry little weight.

2. *Liability of him who creates a nuisance.*—He who by himself or by his servants by a positive act of misfeasance (as opposed to a mere non-feasance, such as an omission to repair) creates a nuisance is always liable for it, and for any continuance of it, whether he be the owner, the occupier or a stranger, and notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it (e). Thus, if any building obstructs ancient lights, or interferes with any other servitude, the builder is liable no less than the occupier of the land on which the building stands (f). Moreover, this liability is a continuing one, extending not merely to the wrongful act itself, but to the continuance of the wrongful state of things which results from it. It is no defence that the defendant has no power to abate or

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(b) *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. p. 282, *per* Eve, J.; *Green v. Matthews* (1930), 46 T. L. R. 206; *Nicholls v. Ely Beet Sugar*, [1931] 2 Ch. 84.

(c) [1940] A. C. 880.

(d) *Sedleigh-Denfield's Case*, *supra*, pp. 899, 905, 907, 918. So Friedmann, 59 L. Q. R. 69—71 and 3 Mod. L. R. 308, and Landon 56 L. Q. R. 143. *Contra*, Winfield 496, 499—501, 508—9, and 56 L. Q. R. 3—4. The present law has been largely built up on cases of public nuisance; nevertheless Winfield wishes to keep them distinct, thereby, it is submitted, adding unnecessary complications to the law.

(e) Cp. Friedmann in 59 L. Q. R. pp. 63—4.

(f) *Thompson v. Gibson* (1841), 7 M. & W. 456; *Dalton v. Angus* (1881), 6 App. Cas. 740.



put an end to this state of things, for he ought not to have created it (g). In *Dollman v. Hillman* (h) the defendants, the owners of a butcher's shop, were held liable to the plaintiff who had slipped on a piece of fat which had come on to the pavement from their shop. They were responsible, for directly or indirectly they must have caused this public nuisance.

So it has been said (i) that if a nuisance is created on a highway liability arises irrespective of negligence. Thus, where a man on a motor-cycle was killed by running into the defendant's unlighted trailer which had been parked on the near side of the highway after the lorry to which it was attached had broken down, it was held in the Court of Appeal that it was unnecessary for the deceased's mother in an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, to prove that the defendants had been guilty of any negligence (k). It may be doubted, however, whether a man who lawfully brings his vehicle on to the highway in a roadworthy condition can be properly said to have created a nuisance by a positive act of misfeasance if through no fault of his the vehicle breaks down and after he has parked it by the roadside the lights go out without fault on his part. Such a case would seem analogous rather to those cases with which we shall deal later (l) which come under the head of continuance of a nuisance. So in a later case in the Court of Appeal, *Maitland v. Raisbeck* (m), where a motor omnibus ran into a lorry the lights of which had failed without any negligence on the part of the driver, it was said that there is no general proposition that in the case of an accident which causes an obstruction a nuisance is automatically and at once created. Every person has a right to use the highway, and if something happens to him, in no way referable to his fault, which causes an obstruction, a nuisance is not *ipso facto* created. But if he allows it to be an obstruction in unreasonable circumstances or for an unreasonable time a nuisance is created. The time may come when failure to take some appropriate steps will render him liable for maintaining a nuisance in the highway. "The

(g) *Thompson v. Gibson* (1841), 7 M. & W. 456; *Roswell v. Prior* (1701), 12 Mod. 635.

(h) [1941] 1 A. E. R. 355.

(i) *Pope v. Fraser Mills* (1938), 55 T. L. R. p. 325, *per* Humphries, J.

(k) *Ware v. Garston Haulage Co.*, [1944] K. B. 30. See the instructive criticism of this case by T. H. Tylor in 7 Mod. L. R. 155, and Lord Greene, M.R., in *Maitland v. Raisbeck*, [1944] K. B. p. 692, described it as "a case of very special facts". See 61 L. Q. R. p. 8; 56 Jur. Rev. p. 167.

(l) *Infra*, s. 57 (8).

(m) [1944] K. B. p. 698.

user of the highway", said Lord Greene, M.R., "is entitled to use it in a reasonable manner and to expect other people to do the same, but on the highway accidents happen when both parties have been reasonable and neither has misused the highway. If damage arises in those circumstances, the person injured must put up with it" (n).

3. *Liability of landlord who authorises his tenant to create or continue a nuisance.*—On the same principle the landlord is liable when he has expressly or impliedly authorised his tenant to create or continue the nuisance. In *Harris v. James* (o) a landlord was held liable for a nuisance caused by the act of his tenant in blasting operations and the burning of lime, on the ground that the land was let to him for that very purpose, which was necessarily a nuisance. "There can be no doubt", says Blackburn, J. (p), "that where a person authorises and requires another to commit a nuisance, he is liable for that nuisance; and if the authority be given in the shape of a lease, he is not the less liable." If, however, the purpose for which the lease is granted is not such as necessarily to cause a nuisance, the landlord is not responsible merely because a nuisance is in fact created by the manner in which the tenant chooses to conduct his operations. On this principle, in *Rich v. Basterfield* (q) it was held that a landlord was not responsible for a nuisance caused by the smoke of defective chimneys: it being possible for the tenant to avoid the commission of the nuisance—as, for example, by the use of coke instead of coal (r). Nor in such a case is the landlord to be deemed to authorise the nuisance simply because, with knowledge of its existence, he refrains from exercising his right of determining the tenancy (s), or takes no active steps to prevent what is being done (t).

Where the landlord is liable for creation or authorisation his

(n) *Supra*, s. 8 (2).

(o) (1876), 45 L. J. Q. B. 545; *Metropolitan Properties v. Jones*, [1939] 2 A. E. R. 202.

(p) *Harris v. James* (1876), 45 L. J. Q. B. p. 546.

(q) (1847), 4 C. B. 783.

(r) In *Harris v. James* (1876), 45 L. J. Q. B. 545, however, this case was criticised in respect of the application of the general principle to the facts: a nuisance being the necessary result of the mode of user contemplated by the landlord—namely, the consumption of coal. Cp. *R. v. Pedley* (1834), 1 A. & E. 822.

(s) *Bowen v. Anderson*, [1894] 1 Q. B. 164; *Gandy v. Jubber* (1864), 5 B. & S. 78; 9 B. & S. 15.

(t) *Malzy v. Eichholz*, [1916] 2 K. B. 308 (mock-auction conducted on the premises).

liability is concurrent with and not exclusive of that of the tenant (u).

4. *Liability of landlord who lets premises with nuisance on them.*—A further extension of this principle is that a landlord is or may be liable when the nuisance existed at the commencement of the tenancy, and was known or ought to have been known by the landlord to exist, and the premises were let without any covenant on the part of the tenant to repair or otherwise discontinue or prevent the nuisance (x). This is apparently the result of the cases of *Todd v. Flight* (y) and *Gandy v. Jubber* (z), as qualified and limited in their operation by the later cases of *Pretty v. Bickmore* (a) and *Gwinnell v. Eamer* (b). Here also the rule is probably to be regarded as merely an application of the rule as to authorisation. By letting the premises with the nuisance already existing, the landlord is to be deemed to have authorised its continuance, unless he has taken a covenant from the tenant binding him to discontinue it (c) (d).

5. *Liability for independent contractor.*—It is on an analogous principle that, as we have seen (e), the employer of an independent contractor is liable in nuisance if the work on which the contractor is employed is one which in its very nature involves a special danger of creating a nuisance. Two long recognised illustrations of this liability are liability for dangerous work done in a highway (f), and

(u) *Brent v. Haddon* (1619), Cro. Jac. 555; *Ryppon v. Bowles* (1615), Cro. Jac. 373; *Roswell v. Prior* (1701), 12 Mod. 635.

(x) *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. p. 7, per Scrutton, L.J. See *Stallybrass* in 45 L. Q. R. p. 120. Pollock, p. 342, does not accept this rule.

(y) (1860), 9 C. B. (n.s.) 377.

(z) (1864), 5 B. & S. 78; 9 B. & S. 15.

(a) (1873), L. R. 8 C. P. 401.

(b) (1875), L. R. 10 C. P. 658; *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1.

(c) Cp. *Bovill, C.J.*, in *Pretty v. Bickmore* (1873), L. R. 8 C. P. p. 404.

(d) It may be that if the landlord actually knows of the nuisance at the date of the letting, he is liable even if he takes a covenant from his tenant: *Gwinnell v. Eamer* (1875), L. R. 10 C. P. p. 661, per Brett, J. (doubting). Pollock, p. 342, contra. However this may be, it is settled that the mere continuance of a determinable tenancy (for example, a tenancy from year to year, or a weekly tenancy) is not to be deemed a letting so as to make the landlord responsible for nuisances which have come into existence since the beginning of the term: *Bowen v. Anderson*, [1894] 1 Q. B. 165; *Gandy v. Jubber* (1864), 9 B. & S. 15. See Pollock on this case, p. 342, n. (n).

(e) *Supra*, s. 31 (4).

(f) *Gray v. Pullen* (1864), 5 B. & S. 970.

liability for interference with support to land or buildings (g)—the one a public, the other a private nuisance.

6. *Liability for nuisances not created by the defendant.*—More difficult questions arise in determining what liabilities may be incurred where the nuisance is created neither by the defendant nor by those whom by the intendment of law he has authorised to create it. The underlying principle is that control carries with it responsibility. “I have the control and management”, said Abbott, C.J. (h), “of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another.”

*Liability of occupier.*—The occupier always has control. “The injuries done upon land or buildings”, said Littledale, J., in the same case (i), “are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises.” Thus in *White v. Jameson* (k) the occupier of land was held liable for a nuisance caused by a licensee through the burning of bricks upon the premises.

7. *Liability of owner.*—On the other hand the owner of premises is not *as such* liable for nuisances which exist upon them. No action, therefore, will in general lie against a landlord for any nuisance existing on premises leased by him to a tenant, the sole remedy being against the tenant (l). But it was long ago held in *Payne v. Rogers* (m) that the landlord is liable when the nuisance is due to a breach by him of the covenants of the lease: for example, when the premises are allowed by him to fall into a dangerous state of disrepair, and the duty of repair is cast upon him by the terms of the lease. Sir John Salmond considered this case unsatisfactory, and thought it anomalous that the terms of the contract between landlord and tenant should operate *inter alios*, so as to determine

(g) *Bower v. Peate* (1876), 1 Q. B. D. 321.

(h) *Laugher v. Pointer* (1826), 5 B. & C. p. 576. Cp. *Wringe v. Cohen*, [1940] 1 K. B. p. 233.

(i) *Laugher v. Pointer* (1826), 5 B. & C. p. 560.

(k) (1874), L. R. 18 Eq. 303. Contrast *Att.-Gen. v. Stone* (1895), 12 T. L. R. 76 (gipsies on land a nuisance owing to noise and insanitary condition of camp) with *Att.-Gen. v. Corke*, [1933] Ch. 89 (acts done off the land by caravan-dwellers: liability under the rule in *Rylands v. Fletcher*). But *vide infra*, s. 137 (5).

(l) *Cheetham v. Hampson* (1791), 4 T. R. 318; *Russell v. Shenton* (1842), 3 Q. B. 449; *Pretty v. Bickmore* (1873), L. R. 8 C. P. 401; *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658.

(m) (1794), 2 H. Bl. 350. Cp. *Wringe v. Cohen*, [1940] 1 K. B. p. 233.

the liability of either of them to third persons; and said that the rule, if sound at all (n), was probably to be explained as merely a special application of the doctrine of authorisation already considered—that is to say, a landlord who himself undertakes the duty of repair and disregards it must be taken to have authorised his tenant to leave the premises in a state of disrepair, and is to be held liable accordingly (o). But the anomaly disappears if we regard the liability as resting on control. Goddard, J., so regarded it, and in *Wilchick v. Marks* (p) held that where there was no agreement between landlords and tenant as to repairs, but the landlords knew that there was adjoining the street a defective shutter on premises over which they had reserved the right to enter and do repairs, they were liable to a passer-by who was injured by the defective shutter. But the tenant is not exempt because the landlord is liable (q).

8. *When nuisance not created by occupier, he is not liable except for continuance.*—In the following discussion of the duties of an occupier that term must therefore be taken to include the landlord who has taken upon himself the duty of repair or reserved a right to enter to do repairs. When, then, will an occupier be liable for a nuisance which he has neither created nor authorised? The problem may arise in three ways: (1) The occupier may have taken over the nuisance when he acquired the property, or (2) the nuisance may be due to a latent defect (r), or (3) to the act of a trespasser or stranger (s). Instances of the first case are the tenant of a house which obstructs the plaintiff's lights (t), and the purchaser of land

(n) It is repudiated by Lawrence, L.J., in *St. Anne's Well Brewery v. Roberts* (1928), 140 L. T. p. 8. But see *Stallybrass* in 45 L. Q. R. pp. 119–20. Statutory relief from the obligation to repair as between landlord and tenant does not relieve from the duty not to create a statutory nuisance under the Public Health Act, 1936, or to abate one existing on property when ordered to do so: *Turley v. King*, [1914] 2 A. E. R. 489.

(o) *Cp. Pretty v. Bickmore* (1873), L. R. 8 C. P. p. 405, *per* Keating, J.

(p) [1934] 2 K. B. 56, followed on this point in *Heap v. Ind, Coope*, [1940] 2 K. B. 476. Contrast *Bank View Mills v. Nelson Corporation*, [1943] K. B. 337.

(q) So held by Goddard, J., in *Wilchick v. Marks*, [1934] 2 K. B. 56, adopting Salmond's view as correct. *Contra*, *obiter*, Heath, J., in *Payne v. Rogers* (1794), 2 H. Bl. 350, on the unsatisfactory ground that "to hold the tenant liable would encourage circuitry of action". It is also to be observed that the landlord's contract to repair, though it may make him liable to outsiders for a nuisance, does not make him liable for injuries suffered by persons entering upon the premises: *vide infra*, s. 134 (4).

(r) As to what is a latent defect, see Hallett, J., in *Cushing v. Walker & Son*, [1941] 2 A. E. R. p. 700.

(s) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 904, *per* Lord Wright.

(t) *Ryppon v. Bowles* (1615), Cro. Jac. 373; *Roswell v. Prior* (1701), 12 Mod. 635.

on which a nuisance exists (u). Thus in *Coupland v. Hardingham* (x) the occupier of a house was held liable for injuries caused by a dangerous unfenced area abutting on the street, although the premises were in the same condition when his occupation commenced. *Sedleigh-Denfield v. O'Callaghan* (y) is an example of the third class of case. A trespasser laid a pipe and grating in the defendants' ditch, so badly placed that the grating became choked with leaves and water overflowed on to the plaintiff's premises. What then are the duties of the occupier in such cases? His duty is not merely to refrain from positive acts of misfeasance which cause a nuisance, but also to abate a nuisance of the existence of which he knew or ought to have known. Thus the House of Lords approved (z) the statement of the law by Sir John Salmond. "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, as where it is caused by a secret and unobservable operation of nature, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement". So in *Noble v. Harrison* (a) the occupier of land was held not liable when the branch of a beech tree growing on his land and overhanging a highway suddenly broke off owing to a latent defect not discoverable by any reasonably careful inspection and damaged the plaintiff's motor-coach which was passing along the highway. In *Sedleigh-Denfield's Case* on the other hand the defendants were held liable. They knew through their servant of the existence of the pipe and ought to have recognised the possibility of a flood occurring. They had "presumed knowledge" of the existence of the nuisance. "An absentee owner or an occupier oblivious of what is happening under his eyes is in no better position than a man who looks after his property" (b). "The occupier 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to

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(u) *Penruddock's Case* (1597), 5 Co. Rep. 100b; *Roswell v. Prior* (1701), 12 Mod. 635. See Potter in 49 L. Q. R. pp. 166-7.

(x) (1813), 3 Camp. 398 (an action in negligence).

(y) [1940] A. C. 880, following *Barker v. Herbert*, [1911] 2 K. B. 688, and overruling *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B. 341.

(z) S.C. p. 893 (Lord Maugham), p. 910 (Lord Wright).

(a) [1926] 2 K. B. 332.

(b) At p. 887, per Lord Maugham. So where there was broken glass in an unoccupied house due to an air-raid on Friday, it was no defence for leaving it unattended till Monday that the owner, having no housekeeper, had no knowledge of the damage or that it was difficult to get labour over the week-end: *Leanse v. Lord Egerton*, [1943] K. B. 323.

an end though with ample time to do so" (c). *A fortiori*, will the occupier be liable if he "adopts" the nuisance, i.e., if he makes any use of the artificial contrivance which constitutes the nuisance (d). But you cannot be said to continue that which you cannot by any reasonable means prevent (e).

9. *Liability of occupier for non-repair of unknown nuisance.*—The opinions given in the House of Lords (with the possible exception of that of Lord Porter (f)) suggest (g) that the same principles apply if there is a continuing nuisance existing on the premises when the occupier first enters into possession of them (h) (i). "The occupier or owner is not an insurer" (k). "The liability for a nuisance is not, at least in modern law, a strict or absolute liability" (l). It would seem, therefore, that the occupier will not be liable if he did not know and could not by the exercise of reasonable care have known of the existence of the nuisance (m). There is, however, as the authorities stand, one possible exception to this rule. In *Wringe v. Cohen* (n) the Court of Appeal held that a landlord with a right to enter to do repairs was liable to an adjoining owner for damage due to defective repair of a wall, though he neither knew nor ought to have known of the danger. The Court distinguished damage due to want of repair from damage due to the acts of trespassers or a latent defect, e.g., a secret and unobservable operation of nature such as a subsidence. "Positive acts and neglect of duty are thus placed on the same footing" (o). But this begs the question: Is there a duty in the absence of actual or presumed knowledge? The judgment in *Wringe v. Cohen* was

(c) *Sedleigh-Denfield's Case*, at p. 913, per Lord Romer. Cp. pp. 894 (Lord Maugham), 897 (Lord Atkin), 905 (Lord Wright). Cp. *Slater v. Worthington's Stores*, [1941] 1 K. B. 488 (accumulation of snow on roof for four days).

(d) S.C. p. 894, per Lord Maugham, cp. Lord Atkin at p. 897.

(e) *Smith v. G. W. Ry.* (1926), 135 L. T. 112.

(f) At p. 919.

(g) Especially Lord Wright, at p. 904.

(h) It has been said that no action will lie against an occupier for a mere failure to abate a nuisance which existed at the commencement of his occupation, until and unless he has been requested by the plaintiff to abate it: *Penruddock's Case* (1597), 5 Co. Rep. 100b.

(i) This principle is not applicable so as to make the occupier of land liable for a subsidence which happens during the period of his occupancy by reason of an excavation or other withdrawal of support in the time of his predecessor in title. *Infra*, s. 60 (14).

(k) S.C. p. 897, per Lord Atkin.

(l) S.C. p. 904, per Lord Wright.

(m) *Wilkins v. Leighton*, [1932] 2 Ch. 106; *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. p. 7, per Scrutton, L.J.

(n) [1940] 1 K. B. 229.

(o) *Ibid.*, at p. 248.

delivered before the hearing in the House of Lords of *Sedleigh-Denfield's Case*, but it was not referred to in either the arguments of counsel or in any of the opinions delivered by the Court (p). It is submitted that it is inconsistent with the assumptions underlying the opinions in the later case and, though binding except in the House of Lords (q), cannot be regarded as in accord with true principle (r).

10. *Liability of occupier after occupation ceases*.—Does a person who is in occupation of premises on which there is a nuisance, and who is liable for that nuisance by virtue of his occupation, cease to be so liable when he ceases to occupy? Does a vendor of land, for example, put off his responsibility along with his ownership? Or does the liability of a tenant cease with the assignment, surrender, or determination of the lease? On this point there is little authority, but it is submitted that, except in the case of nuisance by positive misfeasance, liability dependent on occupation lasts only so long as the occupation on which it is based.

In the case of positive misfeasance, however, this is not so. Liability of this kind is based not on occupancy, but on the doing of the act which creates the nuisance; and its continuance, therefore, is independent of the ownership or occupation of the property on which the act is done. Thus, he who builds a house which obstructs

(p) Presumably because at the time notice of appeal had been given in *Wringe v. Cohen*, which was therefore *sub judice*.

(q) As on the Court of Appeal in *Heap v. Ind, Coope*, [1940] 2 K. B. 476, and on Hallett, J., in *Cushing v. Walker & Son*, [1941] 2 A. E. R. 693, at 699.

(r) *Wringe v. Cohen* might well have been decided on the ground that there was presumed knowledge, for the wall had been in defective repair for three years. Indeed, there can be few cases of want of repair, where the defect is neither latent nor due to the act of a trespasser, in which the occupier has not either knowledge or presumed knowledge. The decision cannot be regarded as satisfactory and is based on a strained interpretation of the authorities. It is, however, in accordance with the view of Salmond (6th ed., s. 71 (3)), and amongst the cases which appear to support it are the following: *Tarry v. Ashton* (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260; 34 L. T. 97; 24 W. R. 581; 40 J. P. 439; *Broder v. Saillard* (1876), 2 Ch. D. 692, and *Humphries v. Cousins* (1877), 2 C. P. D. 239. There has been almost as great a diversity of judicial opinion as to the true *ratio decidendi* of *Tarry v. Ashton* (see Friedmann, 59 L. Q. R. pp. 67-8; Winfield in 56 L. Q. R. 2) as there is in the reports. Landon has well said (56 L. Q. R. 143) that it is "remarkable that so much importance has been attached to this unconsidered and ill-reported decision". *Broder v. Saillard* was accepted by Lord Porter in *Sedleigh-Denfield's Case* (p. 919), but Lord Atkin clearly had some doubts (p. 898) and appears to treat it as a *Rylands v. Fletcher* case. *Humphries v. Cousins* can in the opinion of Lord Atkin (p. 898) be explained as a *Rylands v. Fletcher* case. Goddard, L.J., distinguished it in *Kiddle v. City Business Properties*, [1942] 1 K. B. 269. For a fuller criticism of *Wringe v. Cohen*, see Friedmann, 3 Mod. L. R. 305; 59 L. Q. R. 63; Winfield, pp. 508-9, and in 56 L. Q. R. 1; Landon in 56 L. Q. R. 140.



ancient lights remains liable for the continuance of that obstruction, even after he has sold the property (s).

### § 58. Injuries to Servitudes

1. *Servitudes*.—We must now deal in particular with those nuisances which consist of the wrongful disturbance of an easement or other servitude appurtenant to land. Servitudes may be classified into easements, profits and licences, which last are equitable servitudes only.

2. *Easements and profits distinguished*.—A profit entitles its owner to take away and appropriate some part of the produce or substance of the servient land, whereas an easement entitles him merely to the use or benefit of the land without any such appropriation (t), so that the owner of an easement cannot maintain trespass (u). Thus, a right of way or of support is an easement, but a right of pasturage or of fishing or of mining is a profit. It is to be noted, however, that a right to take *water* is an easement and not a profit (x).

3. *Subject-matter of easements*.—The proper place for a discussion of the nature of servitudes is a book on the law of property (y), but it is important to remember that the interest which is the subject-matter of an easement must be capable of forming the subject-matter of a grant (z). It is for this reason that there can be no easement consisting in a right to an uninterrupted view from the windows of a house (a), or in a right to the uninterrupted view of one's business premises from the public road (b); nor can there be any right of privacy amounting to a legal easement—a right, for example, that the owner of a house

(s) *Roswell v. Prior* (1701), 12 Mod. 635. *Supra*, s. 57 (2).

(t) For the difference between profits and easements, see Cheshire, *Real Property*, pp. 273-5.

(u) *Paine & Co. v. St. Neots Gas Co.*, [1939] 3 A. E. R. p. 823, *per* Luxmoore, L.J.

(x) *Race v. Ward* (1855), 4 E. & B. 702.

(y) Salmond, however, gave a considerable space to the discussion of this topic in ch. 8 (7th ed.). For a full treatment of the subject see Cheshire, *Real Property*, pp. 225-43.

(z) Cheshire, *Real Property*, pp. 232-7.

(a) *Leech v. Schweder* (1874), L. R. 9 Ch. at p. 475; *cp. Campbell v. Paddington Corporation*, [1911] 1 K. B. 869.

(b) *Butt v. Imperial Gas Co.* (1866), L. R. 2 Ch. 158.

shall not open windows in it so as to overlook the adjoining garden (c).

4. *Natural and acquired servitudes.*—Servitudes are either natural or acquired. Natural servitudes are those which are naturally appurtenant to land, and therefore require no special mode of acquisition, for example, the right of land, unencumbered by buildings, to the support of the adjoining land. But the right of a building to the support of adjoining land or buildings is an acquired easement.

5. *Chief easements.*—The chief recognised easements are (1) rights of way, (2) rights of entry for any purpose relating to the dominant land (d), (3) rights in respect of the support of land and buildings, (4) rights of light and air, (5) rights in respect of water, (6) rights to do some act which would otherwise amount to a nuisance to the servient land (e), (7) rights of placing or keeping things on the servient land (f).

6. *Disturbance of servitudes.*—Any act done without lawful justification, either by the owner of the servient land or by a stranger, which interferes with the exercise or enjoyment of any easement or profit is a tort actionable at the suit of him who is in lawful possession of the dominant land or in whom the profit is legally vested in possession (g). Thus, in *Fitzgerald v. Firbank* (h) the grantees for a term of years of a right of fishing in a river were held entitled to receive damages from a railway contractor who in the course of his work discharged such quantities of muddy water into the river as to drive away the fish.

7. *Possessory title to servitudes. The jus tertii.*—It is a difficult question to determine how far in the case of disturbance of servitudes mere *de facto* possession is a sufficiently good title against a wrong-doer. Such possession may be of two kinds:—(a) The use and enjoyment without legal title of a legal servitude vested in some other

(c) *Turner v. Spooner* (1861), 30 L. J. Ch. 801. See also *Victoria Park Racing Co. v. Taylor* (1937), 58 C. L. R. 479 (in the High Court of Australia), and *Winfield* in 47 L. Q. R. p. 27.

(d) *E.g.*, a right to enter and open sluices to prevent flooding: *Simpson v. Godmanchester Corporation*, [1897] A. C. 696.

(e) *E.g.*, a right to conduct a noisy or otherwise offensive business. See above, a. 56.

(f) *E.g.*, a right to have a signpost or signboard on the adjoining land or building: *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296; *Moody v. Steggles* (1879), 12 Ch. D. 261.

(g) 1 Wms. Saunders, 626.

(h) [1897] 2 Ch. 96.

person: as when I occupy without title land to which a right of ancient lights or a right of way is legally appurtenant. (b) The use and enjoyment *de facto* of benefits of a kind capable of being the subject of a servitude: as when the owner of a house is *de facto* in the possession of support afforded to it by the adjoining land, or of the access of light to his windows, no legal right to such support or light having been acquired by grant, prescription, or otherwise.

As to the first of these modes of possession a possessory title to land will bring with it a possessory title to all servitudes legally appurtenant to that land, and a *stranger* (i.e., any person other than the lawful owner or occupier of the servient land) can no more plead the *jus tertii* in an action for the disturbance of a right of way, light or support than in an action for trespass or nuisance.

But can the servient owner himself plead the *jus tertii* of the true dominant owner? Probably in this case a distinction must be drawn between natural and acquired servitudes. In the case of natural servitudes a possessory title is valid even against the servient owner as in *Nicholls v. Ely Beet Sugar Factory* (i), where it was held that the *jus tertii* was no defence to an action for polluting a several fishery and damaging the fish. But in the case of acquired servitudes such a title is probably invalid, and the servient owner could plead that the person to whom the servitude had been granted was neither the plaintiff nor any person through whom he claimed. In such a case the plaintiff would have to plead and prove his title to an acquired easement.

We come now to the second form assumed by possessory titles to servitudes—viz., that which is based on the mere use and enjoyment *de facto* of benefits of a kind capable of being the subject of a servitude which has no legal existence as against the land over which it is enjoyed. Such enjoyment has, of course, no protection as against the owner of the quasi-servient land; but the question which we have to consider is whether it is not protected *adversus extraneos*. If a trespasser on the adjoining land injures my house by interfering with its *de facto* support, or blocks up my modern windows, will he be permitted to plead that I have acquired no legal servitude over the land entitling me to such support or light?

The answer to this question is not clear. In *Paine and Co. v. St. Neots Gas Co.* (k) (a pollution action), Goddard, L.J., said that

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(i) [1931] 2 Ch. 84. But Farwell, J., was careful to limit his decision to the pollution actions, which are "not trespass, but very analogous to trespass".

(k) [1938] 4 A. E. R. 592, 598.

if a man sues to protect an easement of support or a right of way he must prove that the right of support or way has been acquired, and in the same case on appeal (l), Luxmoore, L.J., said that in an action of nuisance the owner of the easement, if his title is put in issue, must establish that title. But Scott, L.J. (m) preferred to express no opinion as to whether the *jus tertii* could be set up, remarking that it is not easy to picture a case where the facts are sufficient to establish real possession of a water supply without disclosing a title of some sort sufficient to confer a right of action based on title. But in *Jeffries v. Williams* (n) and *Bibby v. Carter* (o) it was held that it was an actionable wrong for a stranger to do damage to a house by interfering with the support received by it from adjoining land, even though no right to that support had been acquired against the owner of that land. It cannot, however, be that every one with *de facto* enjoyment is protected against a stranger, for example, the man who has been in the habit of crossing Blackacre and has no interest in any land to which a right of way over Blackacre could become annexed, or the poacher whose practice of catching fish has been interfered with by pollution of the water of a stream.

In spite of the *St. Neots Gas Company's Case* (p) the only logical and practical principle, it is submitted, is that any interference by a stranger which does damage should be actionable if it is interference with a *de facto* enjoyment (a) of a kind capable of subsisting as an easement or profit, and (b) existing in circumstances which if continued long enough would lead to there being an easement or profit by prescription (q).

### § 59. Licences

1. *Licences defined.*—A licence is an agreement (not amounting to the grant of a legal easement or profit) that it shall be lawful for the licensee to enter upon the land of the licensor, or to do some other act in relation thereto which would otherwise be illegal.

(l) [1939] 3 A. E. R. 812, 823.

(m) At pp. 816-7. Cp. Winfield, p. 514.

(n) (1850), 5 Ex. 792.

(o) (1859), 4 H. & N. 153. This proposition of law was raised in the case of a local authority acting under a clearance order, but Simonds, J., found it unnecessary to decide it in *Bond v. Norman*, [1939] Ch. p. 855.

(p) [1939] 3 A. E. R. 812.

(q) So Smith, L. C. (13th ed.), p. 397. *Contra*, Holmes, Common Law, pp. 240-1, 381-2. For Salmond's views, which differ from those in the text, see 6th ed., p. 302. The question of the protection of *de facto* easements is closely connected with that of the right of action possessed by licensees, as to which see *infra*, s. 59 (3).

Nothing is to be classed as a licence which amounts to a valid legal easement or profit (r).

2. *Licence runs with the land in equity*.—Since a licence is not a legal servitude, it does not run with the servient land at law so as to bind all subsequent owners of it. At law, indeed, it is a mere agreement, which binds no one save the grantor himself. Such an agreement, however, if of such a nature as to be specifically enforceable, amounts to a good equitable servitude—that is to say, it binds and runs with the land in equity so as to be enforceable not merely against the grantor, but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right (s).

3. *Damages against licensor*.—A licensee has an action for damages for breach of contract against the licensor for any disturbance of the licence committed by him (t).

*But not against strangers*.—But since the licensee has no legal estate or interest in the servient land, he has, it would seem, no remedy at law against any subsequent owner or occupier or any stranger for a disturbance of his right. This was decided in the case of *Hill v. Tupper* (u), in which the plaintiff had acquired by grant under the seal of a canal company an exclusive right of keeping pleasure-boats for hire upon the canal. He sued at law for damages a stranger who infringed this monopoly, and it was held that he had no such cause of action.

This absence of a legal remedy by way of damages available by a licensee against a stranger is a very anomalous feature of our law. It seems curious that he who, by agreement with the occupier of a building, has expended money in painting advertisements upon one of its walls should have no civil remedy against a third person who wilfully defaces them. The whole law on this matter requires more consideration than it has yet received (x).

(r) See *Cheshire, Real Property*, pp. 238–41.

(s) *Moreland v. Richardson* (1865), 25 L. J. Ch. 888; *Hervey v. Smith* (1866), 22 Beav. 299.

(t) *Kerrison v. Smith*, [1897] 2 Q. B. 445; *Wells v. Kingston-on-Hull* (1875), L. R. 10 C. P. 402; *Wilson v. Taverner*, [1901] 1 Ch. 578; *Lowe v. Adams*, [1901] 2 Ch. 598; *King v. David Allen & Sons, Ltd.*, [1916] 2 A. C. 54.

(u) (1863), 2 H. & C. 121.

(x) It has been suggested (*Smith's L. C.*, i, 397) that there is at least one important class of licences in which the rule in *Hill v. Tupper* has no application—viz., those in which the licence is of such a nature that it would, if created by deed or prescription, amount to a legal easement or profit (e.g., a right of way or of light created by written agreement only). It is also a question fit to be considered

4. *Licences revocable at will.*—At common law a licence was revocable at will by the licensor, even though granted for a fixed term, and was therefore no justification for any act done in the exercise of it after revocation. This is known as the rule in *Wood v. Leadbitter* (y). The occupiers of a race-course in breach of their agreement ordered the plaintiff to whom they had sold a ticket for the races to leave the premises while the races were going on, and on his refusal to leave they procured his forcible expulsion by their servant, the defendant. In an action for assault the defendant pleaded that the plaintiff was a trespasser. It was held by the Court of Exchequer that the action would not lie. Although the licence had been revoked improperly and in breach of contract, its revocation was none the less effectual. The plaintiff was a trespasser.

5. *Damages for premature revocation.*—It is to be noticed as to this case that the action was one of tort against the servant of the licensor, and not one for breach of contract against the licensor himself. It is well settled that an action of this latter description will lie in such a case even at common law, and notwithstanding *Wood v. Leadbitter* (z). If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law a trespasser or other wrongdoer. The rule is an illustration of the difference between a legal power to do a thing effectively and a legal right or liberty to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term (a).

6. *Effect of fusion of law and equity on the rule in Wood v. Leadbitter.*—Since the fusion of law and equity by the Judicature Act, however, according to the decision of the majority of the

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whether the power of Courts of equity to grant an injunction to a licensee, taken in conjunction with their power to grant damages in lieu of an injunction, does not exclude the rule in *Hill v. Tupper* in all cases in which an injunction can be granted.

(y) (1845), 13 M. & W. 838.

(z) *Kerrison v. Smith*, [1897] 2 Q. B. 445, and the other cases cited *supra*, s. 59 (3), n. (t).

(a) This section, which has been slightly shortened, was cited with approval by Goddard, L.J., in *Thompson v. Park*, [1944] 1 K. B. p. 410. Cp. *du Parcq, L.J.*, at p. 412 (one preparatory schoolmaster terminating licence to another to share the school buildings).

Court of Appeal in *Hurst v. Picture Theatres, Ltd.* (b), the rule in *Wood v. Leadbitter* has to a very large extent, even if not wholly, become obsolete (c). The reason given for this change is that a licence granted for a fixed period is in all ordinary cases specifically enforceable—an injunction being obtainable to prevent an act based upon its premature revocation (d). A licensee, therefore, cannot be now treated as a trespasser because of doing an act which the licensor may be compelled by a decree of specific performance to allow him to do. Accordingly, in *Hurst's Case* the majority held that the plaintiff, who had purchased from the defendants a ticket entitling him to occupy a seat at an entertainment, had a good cause of action in *tort* for the act of the defendants in forcibly removing him from the building under the mistaken belief that he had wrongfully obtained admission without payment; and the plaintiff recovered substantial damages accordingly as for assault, instead of the merely nominal damages which would have been recoverable in an action for breach of contract. The facts of this case are indistinguishable from those of *Wood v. Leadbitter* itself, yet the decision was to the opposite effect. The decision in *Hurst's Case* does not seem consistent with principle. It appears to confound a licence, which is a mere *jus in personam*, with a demise or easement, which creates a *jus in rem*, and ignores the rule that specific performance will not be granted if damages are an adequate remedy or if the Court cannot supervise the performance (e). If *Hurst's Case* is to be taken as finally settling the law, the rule in *Wood v. Leadbitter* now applies only to cases in

(b) [1915] 1 K. B. 1. See also *Lowe v. Adams*, [1901] 2 Ch. p. 600; *Jones v. Earl of Tankerville*, [1909] 2 Ch. 440.

(c) Sutton, *Personal Actions*, p. 45.

(d) *Frogley v. Lovelace* (1859), John. 333; Cheshire, *Real Property*, pp. 238-41, 282-3.

(e) Holdsworth, H. E. L., vii, 328, says: "Unfortunately a desire to do substantial justice has recently led the Court of Appeal to disregard the rule that a grant must be the grant of some ascertainable property, and, in consequence, both to make a wholly new extension of the equitable modification of the legal rule, and to cast unfortunate and undeserved doubts upon the principles laid down in *Wood v. Leadbitter*." Dr. Cheshire (*ubi supra*) regards the decision in *Hurst v. Picture Theatres, Ltd.*, as unsupportable. Cp. Sir John Miles in 81 L. Q. R. 217; H. G. Hanbury in Equity, pp. 104-5. The High Court of Australia has held (Evatt, J., dissenting) that *Hurst's Case* is manifestly wrong: *Cowell v. Rosehill Racecourse Co.* (1937), 56 C. L. R. 605. But the decision has necessarily been followed by two puisne Judges, Lush, J., in *British Actors' Film Co. v. Glover*, [1918] 1 K. B. p. 307, and McCardie, J., in *Said v. Butt*, [1920] 3 K. B. p. 499. The decision was largely based on arguments *ab inconvenienti*, but Latham, C.J., pointed out in *Cowell's Case* (pp. 621-3) that the inconveniences are not all on one side. Winfield, however, hailed the case as ridding the law of a *damnosa hereditas* (51 L. Q. R. 257), though he does not regard the grounds upon which it was based as altogether technically satisfactory: see his *Torts*, pp. 356-9.

which the licence is of such a nature that an injunction against its premature revocation could not be granted in conformity with the rules of equity in that behalf—so that the licence is revocable at will in equity as well as at law. If a licence is not fit to be specifically enforced (f), neither is it fit to be exercised in defiance of the will of the licensor, and the sole remedy of the licensee ought to be a claim for damages for the breach of contract involved in its premature revocation (g).

7. *Common law limitations on the rule in Wood v. Leadbitter.*—Even at common law the rule in *Wood v. Leadbitter* was subject to the following limitations and qualifications:—

(a) A licensee whose licence is revocable is entitled to reasonable notice of revocation (h). But even if he is not given a reasonable time in which to remove himself and his property, the licence is none the less withdrawn and the withdrawal becomes effective when a reasonable time has expired. What is a reasonable time depends upon all the circumstances of the case (i).

(b) The premature revocation of a licence imposes no obligation upon the licensee to do any act for the purpose of preventing the continuing effect upon the servient land of any act which he may have lawfully done before the revocation (k).

(c) A licence to enter on a man's property is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser. If A sells to B felled timber lying on A's lands, on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence, because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers on B (l).

(f) Equity will only decree specific performance of an enforceable contract; by section 40 of the Law of Property Act, 1925, contracts for the sale or other disposition of interests in land are only enforceable if there is a written memorandum or part performance. *Cheshire, op. cit.* p. 283.

(g) It does not clearly appear, however, from *Hurst v. Picture Theatres, Ltd.*, whether even to this extent the rule in *Wood v. Leadbitter* is to be regarded as still in force.

(h) *Cornish v. Stubbs* (1870), L. R. 5 C. P. 384; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400; *Canadian Pacific Ry. v. The King*, [1931] A. C. p. 432.

(i) *Minister of Health v. Bellotti*, [1944] K. B. 298, the case of the Gibraltar evacuees. At the time that the proceedings for trespass were brought a reasonable time had elapsed, but it seems that the defendants had a right of action for assault for an attempt to eject them by force before the expiry of a reasonable time; see 170 L. T. p. 150, *per* Goddard, L.J.

(k) *Liggins v. Inge* (1831), 7 Bing. 682.

(l) *Jones v. Earl of Tankerville*, [1909] 2 Ch. p. 442; *Wood v. Manley* (1839), 11 A. & E. 34.



8. So far we have dealt with servitudes in general, and it is now necessary to consider the law with regard to four types of easement which are of sufficient importance to call for special examination. These are the following: (1) Rights of Support, (2) Rights of Light, (8) Rights of Water, and (4) Rights of Way.

### § 60. The Right of Support

1. *Natural servitude of support to land.*—Every piece of land has a natural servitude of support from the adjoining land, and also from subjacent land when the surface and substratum belong to different persons.

2. *Not for buildings.*—This rule relates only to the support of land in its natural condition—*i.e.*, unburdened with buildings and unweakened by excavations. If additional support is needed because of any such alteration in the natural condition of the land, a right to it must be acquired by grant, prescription (*m*), or otherwise, and is not a natural incident of property (*n*).

3. *Subjacent and lateral support.*—The right of subjacent as opposed to lateral support comes into existence whenever the ownership of the surface becomes separated in any manner from that of the underlying strata—*e.g.*, when coal or other mineral is granted with a reservation of the surface. The right of support in such cases is natural, and not dependent on any express or implied grant or reservation, and therefore exists in whatever way the separation between surface and subsoil has come about (*o*).

4. *Surrender of right of support.*—In any case the natural right of lateral or subjacent support may be destroyed by its express surrender. Thus, a grant of the right to take coals or other minerals may include permission to let down the surface. But there is a presumption against the surrender of the right to support notwithstanding the grant of a right to extract minerals (*p*). And

(*m*) Certainly by prescription at common law, and probably also by prescription under the Prescription Act. *Selby v. Whitbread*, [1917] 1 K. B. p. 751, *per* McCordie, J.

(*n*) *Dalton v. Angus* (1881), 6 A. C. 740; *Birmingham Corporation v. Allen* (1877), 6 Ch. D. 284.

(*o*) *Humphries v. Brogden* (1850, 12 Q. B. 739.

(*p*) *Duke of Buccleuch v. Wakefield* (1869), L. R. 4 H. L. 377; *Love v. Bell* (1884), 9 A. C. 286; *Butterknowle Colliery Co. v. Bishop Auckland Co-op. Co.*, [1906] A. C. p. 309; *Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257; *Thomson v. St. Catharine's College, Cambridge*, [1919] A. C. 468; *Warwickshire Coal Co. v. Coventry Corporation*, [1934] Ch. 488; *Wath-upon-Deane U. D. C. v. John Brown & Co.* (1935), 51 T. L. R. 353.

a custom for the lord to get minerals beneath the surface of copyhold lands without making compensation for subsidence has been held to be unreasonable (q).

5. *No natural servitude of support to buildings.*—A building has no natural servitude of support either from the adjoining land or from other buildings (r).

6. *Subjacent support of buildings.*—It is possible that a building has no natural right even to subjacent support, but this has never been decided (s). The question is of little importance, because the withdrawal of subjacent support from a building almost inevitably involves the withdrawal of support from the land on which the building stands; and in an action for the latter damages can be recovered for the building also (t).

7. *How right of support acquired.*—A right of support for a building can be acquired by express or implied grant or by open enjoyment for twenty years (u). A full account of this matter, however, pertains to the law of property, and not to that of torts (x).

8. *Disturbance of right of support.*—It is an actionable wrong to withdraw the support to which land or buildings are entitled, and thereby wilfully or negligently to cause a subsidence of the land or structural injury to the buildings.

9. *Actual damage essential.*—No action for damages lies until and unless actual subsidence or other damage has occurred. The wrong consists not in withdrawing the support which the dominant tenement is receiving, but in doing damage by means of such a withdrawal (y). From this follow the rules which we have already set out (z) governing the measure of damages and the application of the Statute of Limitations in such cases. Probably the mere

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(q) *Wolstanton, Ltd. v. Newcastle-under-Lyme Corporation*, [1940] A. C. 860. See 56 L. Q. R. 438.

(r) *Dalton v. Angus* (1881), 6 A. C. 740.

(s) See *Rogers v. Taylor* (1858), 2 H. & N. 828.

(t) *Infra*, s. 60 (12).

(u) *Dalton v. Angus* (1881), 6 A. C. 740; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Lloyds Bank v. Dalton*, [1942] Ch. 466.

(x) See *Dalton v. Angus* (1881), 6 A. C. p. 792; *Humphries v. Brogden* (1850), 12 Q. B. p. 747.

(y) *Backhouse v. Bonomi* (1861), 9 H. L. C. 508.

(z) *Supra*, ss. 35, 37 (2).

subsidence of land is in itself sufficient damage to found an action, even though no pecuniary loss can be shown to have resulted from it (a).

10. *Liability not dependent on negligence.*—The right to support is completely predominant over the right of the servient owner to use his property; and if he cannot rebuild his house or extract his minerals, however carefully or skilfully, without doing damage to the dominant tenement, he is not at liberty to perform these operations at all (b) (c). It is well settled that this is one of the cases in which an employer is liable for the acts of an independent contractor (d). On the other hand, the servient owner is liable solely for misfeasance, and not for the mere non-feasance of failing to keep the servient building in repair (e). But the dominant owner is not bound to sit by and watch the gradual deterioration of his support. He may enter and himself effect the necessary repairs (f).

11. *No right to support from underground water.*—It is not actionable to cause a subsidence of land or structural injury to buildings by the withdrawal of the support of underground water by draining, pumping, or otherwise, unless a right to such support has been acquired by express or implied grant (g). Quicksand, running silt and other semi-fluid substances are to be deemed land and not water within the meaning of this rule, and any withdrawal of the support afforded by them is actionable (h).

(a) *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. p. 311; *Mitchell v. Darley Main Colliery Co.* (1884), 14 Q. B. D. p. 187. See, however, *Smith v. Thackeray* (1866), L. R. 1 C. P. 564, to the contrary.

(b) *Hezt v. Gill* (1872), L. R. 7 Ch. 699; *Humphries v. Brogden* (1850), 12 Q. B. p. 745, 757; *Brown v. Robins* (1859), 4 H. & N. p. 193, per Martin, B.; *Haines v. Roberts* (1857), 7 E. & B. 625; *Hunt v. Peake* (1860), 29 L. J. Ch. p. 787. Sir John Salmond, however, thought that this was no exception to the general principle that liability depends on fault. See 6th ed., pp. 316-7.

(c) It is no defence that the support was withdrawn whilst acting in pursuance of a clearance order made under the Housing Acts, 1930 to 1936: *Bond v. Norman*, [1939] Ch. 847.

(d) *Bower v. Peate* (1876), 1 Q. B. D. 321. *Supra*, s. 31.

(e) *Colebeck v. Girdlers' Co.* (1876), 1 Q. B. D. 234; *Sack v. Jones*, [1925] Ch. 235.

(f) *Bond v. Nottingham Corporation*, [1940] Ch. pp. 438-9, per Greene, M.R.

(g) *Popplewell v. Hodkinson* (1869), L. R. 4 Ex. 248. This seems to be simply a logical extension of *Chasemore v. Richards* (1859), 7 H. L. C. 349.

(h) *Jordeson v. Sutton Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594. In *Jordeson's Case*, at p. 239, Lindley, M.R., expresses doubts as to the principle of *Popplewell v. Hodkinson*, L. R. 4 Ex. 248, but as this was the unanimous decision of the Exchequer Chamber, these doubts must be taken to relate to the true extent of the principle (e.g., its exclusion by implied grant) and not to the correctness of the decision itself.

12. *Measure of damages.*—Even when no easement of support has been acquired by a building, the damages recoverable in an action for causing the subsidence of the land itself will include any consequential damage to the building, unless the subsidence has been caused by the additional pressure of the building (i).

13. *Disturbance of de facto support.*—In the absence of any lawfully acquired easement of support the owner or occupier of land, as opposed to a mere stranger, is under no liability for causing structural damage to buildings on the adjoining land by withdrawing the support which they *de facto* receive, and this is so even though the damage is done wilfully or negligently (k). It may be otherwise, as we have seen (l), in the case of withdrawal of support by a stranger.

14. *Change of ownership between withdrawal of support and resulting subsidence.*—Inasmuch as a considerable interval, possibly one of many years, may elapse between the excavation of land and the happening of resulting subsidence, it must often be the case that during that interval a change has taken place in the ownership or occupation of the servient land on which the excavation exists. Who, in such a case, is liable for the accruing damage? It seems clear that he who originally made the excavation remains liable for the results of it, even though when those results occur he no longer owns or occupies the land (m).

What then is to be said of the occupier at the time when the subsidence happens? Is he liable as well as the original occupier? In *Greenwell v. Low Beechburn Coal Co.* (n), and in *Hall v. Duke of Norfolk* (o), it has been held that the present occupier is under no such liability.

The rule acted on in these cases would seem to be acceptable in principle. It is true, indeed, as we have already seen (p), that where a continuing nuisance exists upon land, the occupier for the time being of that land is liable for the continuance of the injury, although the creation of it was due not to him but to his predecessor in title. It seems, however, that the case of interference

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(i) *Brown v. Robins* (1859), 4 H. & N. 186; *Stroyon v. Knowles* (1881), 6 H. & N. 454.

(k) *Dalton v. Angus* (1881), 6 A. C. p. 804.

(l) See *supra*, s. 58 (7).

(m) *Supra*, s. 57 (2) and (10).

(n) [1897] 2 Q. B. 165, Bruce, J.

(o) [1900] 2 Ch. 493, Kekewich, J. These cases were followed by the *New Zealand C. A.* in *Byrne v. Judd* (1908), 27 N. Z. L. R. 1106.

(p) *Supra*, s. 57.

with the right of support does not in truth fall within the same principle. There is here no continuing injury. The easement of support does not amount to a positive duty to support the dominant land; it only amounts to a negative duty not to interfere with the natural support possessed by that land. This negative duty is broken once for all by him who originally made the excavation, and he alone is and remains responsible for the consequences of his act, whenever those consequences ensue. The distinction is the same as that between continuing trespasses and the continuing consequences of trespass (q).

### § 61. The Right to Light

1. *Acquisition of an easement of light.*—The right to receive light across another's land is not a natural incident of property, but an acquired easement, and unless it has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. The right may be acquired not merely by express or implied grant, but also by prescription, twenty years' continuous enjoyment of light conferring a title to it under the Prescription Act. The easement so acquired is commonly termed a right of ancient lights. It is difficult to see on what rational principle any such form of prescriptive acquisition can be based, and it is a matter for regret that it has succeeded in obtaining legal recognition.

2. *No right of light except in respect of buildings.*—The right to light cannot be acquired by prescription save in respect of a building. No length of enjoyment can confer any right to the access of light to open ground (e.g., a garden) or to any structure which is not a building (r), nor even to a building except through a window; no right can be acquired to light coming through a doorway and used by the occupier to enable him to carry on his business (s). Presumably the same limitation exists in the case of a grant.

3. *Disturbance of right to light.*—When an easement of light has been acquired, it is an actionable wrong to erect or keep any building or other structure or thing on the servient land which so far obstructs the access of light as to render the dominant building

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(q) *Supra*, s. 47 (7).

(r) *Harris v. De Pinna* (1885), 33 Ch. D. 238.

(s) *Levet v. Gas Light and Coke Co.*, [1919] 1 Ch. 24.

uncomfortable or inconvenient for habitation or for any other ordinary purpose for which such a building is adapted. An ordinary purpose is one which does not require an extraordinary or exceptional quantity of light.

The rule as here stated is established by the leading case of *Colls v. Home and Colonial Stores (t)*, which finally settled the law as to the extent of the right to light.

4. *Analogy between interference with light and a nuisance.*—That case authoritatively shows that the action for infringement of a right to light is in the nature of an action of nuisance (*u*). Under the old forms of pleading the appropriate form of action was the action on the case for nuisance, and the pleading contained the allegation *quod messuagium horrida tenebritate obscuratum fuit*. Maugham, J., has said (*x*) that here nuisance is used “in a somewhat artificial sense, because nuisance arising from the deprivation of light of a house is not at all like nuisance from noise or smell”. The test, however, of its actionable nature is the same as in the case of other nuisances—*viz.*, its effect on the comfortable and convenient occupation of the property for ordinary purposes as judged by the standard of ordinary people. And this standard is more rigidly observed in the case of light than in the case of nuisances strictly so called (*y*).

5. *Circumstances affecting liability.*—The effect of an obstructing building upon the lights of the dominant building depends on the following considerations :—

- (a) The amount of light formerly received ;
- (b) The use to which the dominant building is put, or is capable of being put ;
- (c) The size and number of the obstructed windows and the extent of the space to be lighted by them ;
- (d) The existence of other windows not obstructed ;
- (e) The height and proximity of the obstructing building—*i.e.*, the angle of obstruction.

We proceed to consider how far, if at all, each of these considerations is relevant in determining whether an actionable obstruction exists.

6. *Amount of light formerly received.*—The dominant building

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(t) [1904] A. C. 179, 204, 208.

(u) *Cp. Swansborough v. Coventry* (1832), 9 Bing. p. 307, *per* Tindal, C.J.

(x) *Price v. Hilditch*, [1930] 1 Ch. p. 507.

(y) *Supra*, s. 54 (4).

is not necessarily entitled to the whole of the light which it has hitherto received, and even a substantial diminution of this light is not actionable unless it is so great as to produce the effect already defined. The test of an actionable obstruction is not whether a dwelling-house, for example, has been made less bright, cheerful, or desirable than it was before, but whether it has been made uncomfortable according to the standard of ordinary men. Any light received beyond this standard is a surplus luxury for which the law affords the householder no protection at the expense of his neighbours. Further, the diminution of light must be substantial (z).

7. *The use made of the dominant building.*—The use which the plaintiff has actually made or actually intends to make of the building is irrelevant in determining whether the obstruction of light is actionable. The true test is the ordinary uses of which such a building is capable. The plaintiff may for twenty years have used a room in his house as a lumber room, or not have used it at all, and yet he may sue for any obstruction which would prevent its comfortable occupation (a). On the other hand, he cannot increase his right by using his building for a purpose which requires more than the ordinary quantity of light—e.g., for a photographic studio; and this is so, even though the building has been put to that use for the full period of twenty years with the knowledge of the owner of the servient land (b).

8. *Structural arrangement of the dominant building.*—It is, it seems, no defence that the plaintiff's building is structurally defective in the matter of lighting, and that had the windows been large enough or numerous enough no inconvenience would have been suffered by him (c).

*Effect of structural alterations.*—A structural alteration made in the dominant building cannot increase the amount of light to which the building is entitled. The plaintiff cannot by diminishing the size of his windows, or by blocking up one of them, or by

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(z) *Colls v. Home and Colonial Stores*, [1904] A. C. 179. As to what is substantial damage in this connection, see *Slack v. Leeds Industrial Co-operative Society*, [1924] 2 Ch. p. 494, *per Sargant*, L.J.

(a) *Price v. Hilditch*, [1930] 1 Ch. 500. But see also *Smith v. Evangelization Society*, [1933] Ch. p. 522, *per Maugham*, J.

(b) *Ambler v. Gordon*, [1905] 1 K. B. 417. Cp. *Coll's Case*, [1904] A. C., *per Lord Davey* at pp. 202–4, Lord Lindley at p. 211. In *Coll's Case* the question as to the effect of prescription is left open by Lord Davey, [1904] A. C. p. 203.

(c) *Dent v. Auction Mart Co.* (1866), L. R. 3 Eq. p. 251. See, however, the observations of Lord Robertson in *Coll's Case*, [1904] A. C. 181.

increasing the size of a room after he has acquired his right increase the burden on the servient land (d). He must acquire an increased right by twenty years' enjoyment from the date of such an alteration. Thus, in *Colls v. Home and Colonial Stores* (e) the plaintiffs had, less than twenty years before, altered the structure of their building by enlarging the room lit by their ancient windows, and it was held that they had no cause of action simply because they were deprived of sufficient light to light the whole of the room so enlarged. "It would be contrary to the principles of the law relating to easements," says Lord Davey (f), "that the burden of the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement."

9. *Residuary light from other windows*.—In estimating the actionable nature of any obstruction of light, no account is to be taken of any residuary light entering through other windows in respect of which no legal protection exists and which are capable of obstruction by third persons (g) (h).

*Residuary light of other kinds*.—If a plaintiff deprives himself of light which cannot in fact be obstructed except by the plaintiff himself, e.g., light coming through a sky-light, he has only himself to thank (i). In the case of residuary light coming over different servient land, Maugham, J., in *Sheffield Masonic Hall Co. v. Sheffield Corporation* (k) held that when a room in a building receives light through windows on different sides which are ancient lights, the owner of land on either side as a general rule can build only to such a height as, if a building of like height were erected on the other side, would not deprive the room of so much light as to cause a nuisance. The application of the maxim "First come, first served" in such a case is contrary to common

(d) *Ankersen v. Connelly*, [1907] 1 Ch. 678; *News of the World v. Allen Fairhead & Sons*, [1931] 2 Ch. 402.

(e) [1904] A. C. 179. Cp. *Martin v. Goble* (1808), 1 Camp. 320 (malt-house turned into workhouse).

(f) [1904] A. C. p. 202. See also *Smith v. Evangelization Society*, [1933] Ch. 515, 538-9.

(g) [1904] A. C. p. 211, per Lord Lindley. See also *Jolly v. Kine*, [1907] A. C. p. 7, per Lord Atkinson.

(h) For this reason reflected light coming from outside is not taken into consideration: *Price v. Hilditch*, [1930] 1 Ch. p. 506, per Maugham, J. But contrast the observations of the same learned Judge in *Sheffield Masonic Hall Co. v. Sheffield Corporation*, [1932] 2 Ch. p. 24. Light coming through a skylight is direct light, not reflected light: *Smith v. Evangelization Society*, [1933] Ch. p. 536.

(i) *Smith v. Evangelization Society*, [1933] Ch. pp. 527, 539-40, per Romer, L.J.

(k) [1932] 2 Ch. 17.



sense. There is no decision as regards residuary light coming over the same servient land.

10. *The angle of obstruction.*—The actionable nature of any obstruction will depend *inter alia* on the angle of obstruction. In an ordinary case the fact that this angle does not exceed forty-five degrees is *prima facie* proof that the obstruction is not actionable.

If, indeed, the angle of obstruction were the only consideration, the law would be very much simplified. There are, however, as we have seen, several other circumstances to be taken into account which may either increase or diminish the permissible angle. All that can be said, therefore, is that in ordinary cases an angle of forty-five degrees may be presumed not to be excessive (1).

### § 62. The Right to Air

*Acquired right to the passage of air.*—An easement of the passage of air through a defined aperture in a building may be acquired by grant, express or implied, or by prescription. Thus, in *Bass v. Gregory* (m) the plaintiff was held entitled by prescription to the access of air to his cellar through a shaft which opened into a disused well on the defendant's property.

*Only in respect of buildings.*—No prescriptive right, however,

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(1) See *Colls v. Home and Colonial Stores*, [1904] A. C. pp. 204, 210; *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. p. 220, *per* Lord Selborne; *Fishenden v. Higgs and Hill* (1935), 153 L. T. 128. The amount of light which a reasonable man would require is in fine a question of fact. *Cp. per* Maugham, J., in *Smith v. Evangelization Society*, [1933] Ch. p. 522. In *Semon v. Bradford Corporation*, [1922] 2 Ch. 737, Eve, J., acted upon a new test as to what is a sufficiency of light—the sill test. The ratio of light at any given point in a room to the sill light is constant, the sill light being the light available at the outside sill of the window from an unobstructed horizon. The best lighted rooms are at public elementary schools, and the Board of Education requirement is at least 1 per cent. of the sill light at the worst lighted desk. The point at which ordinary common-sense people would begin to grumble is the point in the room at which the percentage of illumination falls to 0.4 of the sill light. Another test is the amount of direct sky which will reach a hypothetical table 2 ft. 9 ins. high in a particular room. But this test is not always satisfactory: see Maugham, J., in *Sheffield Masonic Hall v. Sheffield Corporation*, [1932] 2 Ch. p. 24. In *Fishenden v. Higgs and Hill* (1935), 153 L. T. 128, the most recent case, yet another test was applied—the “grumble line”. According to this the “grumble point” is the point at which you are unable, unless in the fortunate possession of brilliant sunshine, to read without difficulty, and 50 per cent. of an ordinary shaped room (see p. 144) ought to be adequately lighted within the grumble line. (See pp. 131, 137.) The fact that the rental value of the premises is diminished is no test of nuisance, for “people are willing to pay higher rents for luxuries”: *Smith v. Evangelization Society*, [1933] Ch. p. 541, *per* Romer, L.J.

(m) (1890), 25 Q. B. D. 481. See also *Hall v. Lichfield Brewery* (1880), 49 L. J. Ch. 655; *Cable v. Bryant*, [1908] 1 Ch. 259.

can be acquired to the access of air to open ground, or otherwise than to defined apertures in a building. Thus, in *Webb v. Bird* (n), it was held that no action would lie for the obstruction of the passage of wind to an ancient windmill.

### § 63. Rights to Water; Wrongful Abstraction

1. *Classes of water rights.*—There is a natural servitude vested in every owner of land on the banks of a natural stream, entitling him to the continued flow of that stream in its natural condition. An actionable interference with this servitude may take place in at least three different ways:—(1) abstraction, (2) pollution, (8) obstruction.

2. *The right to continued flow of water.*—Every riparian owner has a right to the undiminished flow of the water in a natural stream, subject only to the reasonable use of the water by other riparian owners for the purposes of their riparian property.

3. *Who are riparian owners.*—A riparian owner is the owner or occupier of riparian land (o), and riparian land is that which abuts on or is in contact with the water of a natural stream. The ownership of the land forming the bed of the stream is immaterial with respect to riparian rights (p).

4. *Land on which stream originates.*—Riparian rights belong to lower riparian owners even as against him on whose land the stream has its origin. A landowner on whose property a spring arises, which flows out of it in a natural stream, has no more right to intercept that water than if it were passing through his land from elsewhere (q).

5. *No natural easement over artificial streams.*—This right to the uninterrupted flow of water exists naturally only in the case

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(n) (1863), 13 C. B. (N.S.) 841. See also *Bryant v. Lefever* (1879), 4 C. P. D. 172; *Harris v. De Pinna* (1885), 33 Ch. D. 238; *Chastey v. Ackland*, [1895] 2 Ch. 389; [1897] A. C. 155.

(o) Although it is convenient to speak in this connection of riparian owners, it would be more correct to speak of riparian occupiers. Here, as elsewhere, in respect of injuries to property, the right of action depends in ordinary cases not on the ownership but on the possession of the property affected. The right of an owner who is not in possession is exceptional, and will be considered later. *Infra*, s. 86.

(p) *Lyon v. Fishmongers' Co.* (1876), 1 A. C. 662.

(q) *Dudden v. Clutton Union* (1857), 1 H. & N. 627; *Bunting v. Hicks* (1894), 70 L. T. 455; *Mostyn v. Atherton*, [1899] 2 Ch. 361.

of natural streams. Easements over artificial watercourses must be acquired by grant or prescription (r).

6. *No natural right to the flow of surface water not amounting to a stream.*—There is no natural right to the continued flow of mere surface water not running in any defined natural channel. Therefore the owner of land on which such water exists—e.g., a spring which spreads its supply over the surrounding land instead of directly feeding a natural stream—may by drainage or otherwise abstract or intercept it, without doing wrong to landowners on a lower level who may have received the benefit of such a supply (s).

7. *Principle as to riparian rights a compromise.*—The general principle established by our law after some hesitation, as the most satisfactory solution of the very difficult problem created by the competing and inconsistent interests of upper and lower riparian owners, is a compromise (t).

The lower owners have a right to the undiminished flow of the water as against the upper owners; but it is subject to the reasonable use of the water by the upper owners for the purposes of their riparian lands. "This right," says Parke, B., delivering the judgment of the Court of Exchequer in *Embrey v. Owen* (u), "to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state; . . . it is a right only to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie."

8. *Abstraction for non-riparian uses actionable without proof of damage.*—Any interference with the flow of a natural stream, whether by a riparian owner or by any other person, through the

(r) *Wood v. Waud* (1848), 3 Ex. 748. See *Baily v. Clark, Son & Morland*, [1902] 1 Ch. 649; *Kewatin Power Co. v. Lake of the Woods Milling Co.*, [1930] A. C. 640; *Barllett v. Tottenham*, [1932] 1 Ch. 114. It will be understood that, notwithstanding this distinction between natural and artificial streams, the riparian rights of an owner on the bank of a natural stream will suffice to protect his enjoyment for riparian purposes of water in an artificial channel, such as a millrace, by which he diverts water from the natural stream. See, for example, *Nuttall v. Bracewell* (1866), L. R. 2 Ex. 1.

(s) *Rawstron v. Taylor* (1855), 11 Ex. 369; *Broadbent v. Ramsbotham* (1856), 11 Ex. 602.

(t) See, for a fuller discussion, 9th ed., s. 66 (6).

(u) (1851), 6 Ex. p. 369.

abstraction of water for any purpose unconnected with the use of riparian land is a wrong actionable at the suit of any riparian owner whose portion of the stream is thus affected, even though he suffers no damage.

No upper riparian owner is at liberty to abstract water for other uses than those of his riparian property. As against non-riparian uses the right of the lower owners to the uninterrupted flow of the stream is absolute and unlimited.

*A fortiori*, any such use of the water by a mere stranger, even with the leave and licence of a riparian owner, is actionable at the suit of all proprietors further down the stream.

Nor can any question arise as to whether non-riparian use is in the circumstances reasonable or unreasonable. Thus, in *McCartney v. Londonderry Ry.* (x) it was held by the House of Lords that a railway company had no right to abstract water from a stream for the purpose of supplying the boilers of their locomotive engines, this being a non-riparian use and therefore actionable without proof of damage.

The result is that since all such schemes of diversion for non-riparian use are actionable at common law, they can be effectually carried out only under the sanction of special statutory authority.

9. *But not use not amounting to abstraction.*—Mere non-riparian use, however, which is unaccompanied by any permanent abstraction, and so causes no diminution of the stream as it flows past the plaintiff's land, is not actionable. Thus, in *Kensit v. Great Eastern Ry.* (y) the defendant, not being a riparian owner, took water by means of a pipe from a stream with the permission of a riparian owner, and after using it for manufacturing purposes returned it to the stream at a point above the plaintiff's land, undiminished in quantity and unaltered in quality. For such a use no action lay.

10. *What are riparian uses.*—What, then, are to be accounted riparian uses within the meaning of this rule? Apparently we may say that all uses are riparian in which the water is consumed on the riparian land, and that all uses are non-riparian in which the water is taken away from the riparian land to be applied for any purpose elsewhere. Riparian use will therefore include the use of water for the domestic needs of those who live on the riparian

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(x) [1904] A. C. 301. Cp. *Swindon Waterworks Co. v. Wilts Canal Co.* (1875), L. R. 7 H. L. 697 (supplying neighbouring town).

(y) (1884), 27 Ch. D. 122.

property, for the watering of cattle, for the irrigation of crops, and for any manufacture carried on there.

11. *What is riparian land.*—What, then, shall be accounted riparian land for this purpose? We cannot say simply that it is the whole of any piece of land which at any point touches the stream. For if this were so, the whole of a railway line 200 miles in length would possess riparian rights over every stream that it crossed (z). As is shown in the already cited case of *McCartney v. Londonderry Ry.* (a) this is not the case, for if it were so, the use of water for consumption in the railway company's engines would have been a riparian use, and therefore lawful if reasonable in amount. In the absence of any authoritative definition of the extent of riparian land, we may suggest that the term includes only that land which is substantially adjacent to the stream, and not that which is so remote from it that it would not in ordinary speech be said to lie on its banks, even though at one point it may be connected with the stream.

12. *Prescriptive rights.*—A right of non-riparian user may be acquired by a riparian owner by prescription or grant.

13. *Abstraction for riparian uses.*—Abstraction of water for riparian uses may be of two kinds: the riparian owner may use the water for ordinary (or primary) purposes, or for extraordinary (or secondary) purposes (b). If he uses it for ordinary purposes he may exhaust the water altogether. If he uses it for extraordinary purposes, the use must be reasonable, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.

14. *Ordinary and extraordinary uses.*—The ordinary use of water includes the drinking of it by men and beasts living on the riparian land, and also all other use of it for domestic needs; but the better opinion is that all other uses than these are to be classed as extraordinary (c). The distinction is of practical importance only in the case of very small streams.

(z) Cp. *Attwood v. Llay Main Collieries*, [1926] Ch. p. 459, *per* Lawrence, J.

(a) [1904] A. C. 301. The question is referred to in the judgment of Lord Macnaghten, p. 311.

(b) *Miner v. Gilmour* (1858), 12 Moore P. C. 131, p. 156, *per* Lord Kingsdown; *McCartney v. Londonderry Ry.*, [1904] A. C. 301, p. 306, *per* Lord Macnaghten, and see *Swindon Waterworks Co. v. Wilts Canal Co.* (1875), L. R. 7 H. L. p. 704; *Wood v. Waud* (1849), 3 Ex. p. 781; *Baily v. Clark, Son & Morland*, [1902] 1 Ch. p. 663.

(c) In *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. p. 168, Brett, M.R., suggests that in a manufacturing district the consumption of water for

15. *Extraordinary use unreasonable if damage caused.*—The reasonableness of any secondary or extraordinary use of water seems to depend solely on its effect on the interests of other riparian owners. Every such use is unreasonable and actionable which does actual damage or sensible injury to a lower owner by preventing him from using the water for riparian purposes as beneficially as before, and no riparian use is unreasonable or actionable unless it actually causes such damage (d).

16. *Distinction between action for riparian and for non-riparian use of water.*—It will be noticed that this rule as to the necessity of actual damage marks the essential difference between an action for the riparian use of water and an action for the non-riparian use of it (e).

17. *Damage must be an interference with riparian uses.*—It seems clear on principle that the damage which must be proved in order to sustain an action for unreasonable riparian use must amount to an interference with some riparian use of the water by the plaintiff.

### § 64. Underground Water

1. *No action for interference with underground water.*—It is not actionable for a man to do on his own land any act which interferes with the underground percolation of water, even though water is thereby intercepted which would otherwise have reached a surface stream or the land of another person.

This is the doctrine established by the House of Lords in the

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manufacturing purposes may be deemed one of the ordinary or primary uses; but this suggestion has no support in any decision or even *dictum*, and is, it is submitted, unsound. No local custom not amounting to prescriptive right can so derogate from the common law.

(d) *Baily v. Clark, Son & Morland*, [1902] 1 Ch. 649; *Embrey v. Owen* (1851), 6 Ex. 353. Cp. also *Williams v. Morland* (1824), 2 B. & C. p. 917, *per* Littledale, J.; *Miner v. Gilmour* (1858), 12 Moore P. C. p. 156, *per* Lord Kingsdown. See, however, Lawrence, J. (*obiter*), in *Attwood v. Llay Main Collieries*, [1926] Ch. p. 460, and the note thereon in 9th ed., s. 69 (4), n. (x).

(e) *Supra*, s. 63 (8). General *dicta* as to the necessity of proof of actual damage must be read in the light of this distinction between riparian and non-riparian use, which has not always been sufficiently adverted to in express terms. More than once it has been stated in general terms that in actions for abstraction of water no proof of damage is needed. See, for example, *Embrey v. Owen* (1851), 6 Ex. 353, and *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 500. But if this were true in the case of riparian as well as in that of non-riparian use, what would become of the right of reasonable user supposed to be vested in the upper riparian proprietors? And what other test of reasonableness can be or has been adopted, save the effect of the user upon the interest of the lower owners?

It is to be observed in this connection, however, that when the plaintiff is a reversionary owner, and not an occupier, it may be sufficient if he can prove damage suffered by the present occupier, though none is suffered by himself; because

leading case of *Chasemore v. Richards* (f). The defendants sank a well a quarter of a mile away from a natural stream, and pumped up water for the supply of a neighbouring town; and although the effect was materially to diminish the volume of water in the stream by intercepting its underground sources of supply, it was held that riparian owners had no cause of action. It was *damnum sine injuria* (g).

2. It makes no difference whether the harm so done is accidental or intentional, or whether it is or is not incidental to the honest and reasonable use by the defendant of his own land for his own purposes. The right to abstract or intercept underground water is absolute and unconditional (h).

3. *Except with defined underground channel*.—Where, however, underground water runs in a defined and known (i) channel, as in the case of those streams which for part of their course run beneath the ground, it is subject to the same rules as those which protect a natural stream upon the surface (k). Thus, it is actionable to abstract water from a spring which directly feeds a natural stream, even though the spring is tapped beneath the surface and the water is abstracted before it has become part of the visible stream (l).

4. *Abstraction distinguished from interception*.—The rule in *Chasemore v. Richards* applies to the *abstraction* of underground water from the land of one's neighbour, no less than to the *interception* of underground water which would otherwise have reached that land (m).

the circumstances may be such that by the continuance of the user complained of (which is wrongful as against the tenant) a prescriptive right may be acquired even against the reversioner himself, and this prospective injury he is entitled to prevent by a present action: *Sampson v. Hoddinott* (1857), 1 C. B. (N.S.) 590; *Young v. Bankier Distillery*, [1893] A. C. p. 698, *per* Lord Macnaghten: "Any invasion of this (riparian) right causing actual damage, or calculated to found a claim which may ripen into an adverse right, entitles the party injured to the intervention of the Court." This *dictum* was approved, as regards abstraction, by the Judicial Committee of the Privy Council in *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A. C. 485. Cp. Wms. Saund. pp. 626-7.

(f) (1859), 7 H. L. C. 349.

(g) See also *Acton v. Blundell* (1843), 12 M. & W. 324; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655; *Bleachers' Association v. Chapel-en-le-Frith R. D. C.*, [1933] Ch. 356.

(h) *Mayor of Bradford v. Pickles*, [1895] A. C. 587.

(i) "Defined" means a contracted and bounded channel; "known" means a knowledge by reasonable inference from existing and observed facts at the time the act complained of was committed: *Bleachers' Association v. Chapel-en-le-Frith R. D. C.*, [1933] Ch. 356.

(k) *Chasemore v. Richards* (1859), 7 H. L. C. p. 374, *per* Lord Chelmsford.

(l) *Dudden v. Clutton Union* (1857), 1 H. & N. 627.

(m) *Salt Union v. Brunner*, [1906] 2 K. B. 822.

5. *Pollution.*—The pollution of underground water, as opposed to the abstraction or interception of it, is actionable as a nuisance (o) (p).

### § 65. Pollution of Water

1. *Pollution of a natural stream actionable.*—The pollution of a natural stream is a wrong actionable at the suit of any riparian owner past whose land the water so polluted flows, and, as we have just seen, pollution even of underground water is also actionable.

2. *Pollution defined.*—The term pollution is here used in a wide sense to include any alteration of the natural quality of the water, whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used. Thus, it is actionable to raise the temperature of the stream by discharging into it hot water from a factory (q), or to make soft water hard by discharging into the stream water impregnated with lime (r), no less than to pollute the stream by pouring into it the sewage of a town or the chemical refuse from a factory (s).

3. *No proof of damage required.*—Pollution is actionable without proof of actual damage. The lower owner has a right to the continued flow of the stream in its natural quality, and any sensible alteration of this quality which renders the water less fit for any purpose is an actionable wrong, even though the plaintiff has not in fact been prevented from making any use of the water which he has hitherto made or now desires to make of it (t). There is no right of “reasonable pollution”. An action for pollution will therefore lie, although the water is already, independently of any act of the defendant, so polluted by the acts of other riparian owners that no additional damage is caused by the defendant’s contribution (u).

4. *Alteration of quality not necessarily pollution.*—Yet, although actual damage need not be proved, actual pollution must

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(o) *Ballard v. Tomlinson* (1885), 29 Ch. D. 115.

(p) As to interference with the right of support by the abstraction or interception of underground water, see *supra*, s. 60 (11).

(q) *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155.

(r) *Young v. Bankier Distillery Co.*, [1893] A. C. 691.

(s) *Wood v. Waud* (1848), 3 Ex. 748; *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478.

(t) *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; *Stollmeyer v. Trinidad Lake Petroleum Co.*, [1918] A. C. 485.

(u) *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; *Wood v. Waud* (1848), 3 Ex. 748.



be—*i.e.*, it must be shown not merely that the water has been in some way affected in its natural quality, but that by reason of this alteration it is now less suitable than it was before for some purpose to which it might be applied. If for all practical purposes it is as good as it was in its natural condition, no riparian owner can complain merely because it is *different* from what it was (x).

### § 66. Obstruction of a Stream

1. *Obstruction of a natural stream actionable.*—The erection of any obstruction in the bed of a natural stream, whereby the water is thrown back upon the land of an upper riparian owner, or upon the land of the opposite riparian owner, is actionable at the suit of the owner so affected. A riparian owner has not merely a *right* to receive the water of the stream, but owes towards all upper and opposite riparian owners a *duty* to receive and transmit it. The obstruction of a stream, therefore, may be not only a wrong to the lower owners who are thereby deprived of the water, but also a wrong to the upper owners from whose lands it is prevented from flowing away, and to the opposite owners on whose land more water is cast than would flow there in the ordinary course (y). An obstruction which has no such effect upon any upper or opposite owner is lawful (z).

2. *Right of self-defence against overflow of stream.*—It is lawful for any riparian owner to protect his land from the overflow of the stream in times of flood by raising its banks or in any other way that does not amount to an obstruction in the bed of the stream, even though the effect of these protective measures is to cast the flood-water upon the lands of other proprietors; for no man is bound to receive the overflow of a stream, though he is bound to receive the stream itself (a). Nevertheless, if a stream has an established flood channel in addition to its ordinary channel, any obstruction of the former is just as illegal as an obstruction of the latter (b) (c).

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(x) *Cp. Att.-Gen. v. Cockermouth Local Board* (1874), 18 Eq. 172.

(y) *Orr-Ewing v. Colquhoun* (1877), 2 A. C. 839.

(z) *Orr-Ewing v. Colquhoun* (1877), 2 A. C., at p. 856, *per* Lord Blackburn.

(a) *Nield v. London & N. W. Ry.* (1874), L. R. 10 Ex. 4; *Gerrard v. Crowe*, [1921] 1 A. C. 395; *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. 226. See s. 138 (4), *infra*. It is never legitimate in carrying out works of protection to alter the alveus of the stream: *Provender Millers v. Southampton C. C.*, [1940] Ch. 181.

(b) *Menzies v. Breadalbane* (1828), 3 Bli. N. R. 414.

(c) A difficult and unsettled point in the law as to water rights is the position of a non-riparian owner who, by grant from a riparian owner, is in the enjoyment

## § 67. Rights of Way

1. *Public and private rights of way.*—Rights of way are either private or public. The former call for no special consideration, for they are governed by the ordinary principles already considered by us in relation to easements in general. Public rights of way, on the other hand, are not easements and demand more particular examination. They are of two kinds, for they exist either over highways or over navigable rivers. The law as to these two is essentially the same, and although we shall here speak specifically of highways only, it will be understood that, *mutatis mutandis*, the same principles are for the most part applicable to navigable rivers also (*d*).

2. *Highways.*—A highway (including in that term any public way) is a piece of land over which the public at large possesses a right of way. At common law the ownership of a highway is in the owner or owners of the land adjoining it on either side, the highway having been made such by an actual or presumed dedication of it to the use of the public by the proprietors of the land over which it runs. By statute this common law rule has been so far derogated from that certain kinds of highways are now vested in the municipal corporations or other corporate local authorities having the care and management of them. These statutes, however, have been so interpreted as to vest in the local authorities not the whole of the land on which the highway lies *usque ad coelum et ad inferos*, but only so much of it above and below the surface as is reasonably necessary for the efficient construction, care, and use of the highway. The subsoil below and the space above the limits so defined remain as at common law in the owners of the adjoining lands (*e*).

3. *Classes of injuries in respect of highways.*—There are at least four distinct kinds of injury which may be committed in respect of a highway :—

(a) Modes of user amounting to a trespass against the owner of

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of an artificial watercourse diverted from a natural stream: as when a millowner or manufacturer takes water from the stream in a mill-race or pipe for the use of his mill or factory on non-riparian land. Has such a grantee any right of action for the obstruction or pollution of the water so obtained by him? This question was exhaustively discussed in a note to earlier editions by Salmond: 6th ed., p. 345, to which reference should be made. It seems rather beyond the general scope of this treatise.

(d) *Burley v. Lloyd* (1929), 45 T. L. R. p. 627, per Wright, J.

(e) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904.

the highway. In dealing with the law of trespass we have already considered this matter (f).

- (b) Modes of user amounting to a nuisance to the occupiers of adjoining land. Thus, in *Benjamin v. Storr* (g) it was held to be a nuisance, actionable at the suit of the occupier of a shop adjoining the street, to allow horses to stand so constantly in front of the shop as to darken its windows and pollute the atmosphere.
- (c) Disturbance of that right of access to the highway which is possessed by every occupier of adjoining premises.
- (d) Public nuisance to a highway—i.e., the unlawful disturbance of the public right of passage or the creation of a danger thereon.

These last two forms of injury will be the subject of the succeeding sections.

### § 68. Disturbance of the Right of Access to a Highway

1. *Private right of access to public highway*.—Every person who occupies land immediately adjoining a highway has a private right of access to the highway from his land and *vice versa*; and any act done without lawful justification whereby the exercise of this private right is obstructed is an actionable wrong (h).

At common law a frontager had the right of entrance and exit from his land on to a highway at any point. But this common law right of access has been to some extent cut down by statutes (e.g., the Highway Act, 1885, imposes penalties on persons who wilfully drive a carriage on a footpath), especially since local authorities have vested in them the surface of the highway (i). The relations of frontagers and the public in regard to access to the highway was stated by Lord Atkin in *Marshall v. Blackpool Corporation* (k) as follows: "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. . . . The rights of the public to pass along this

(f) *Supra*, s. 47 (4).

(g) (1874), L. R. 9 C. P. 400.

(h) *Lyon v. Fishmongers' Co.* (1876), 1 A. C. 662; *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243; *Barber v. Penley*, [1893] 2 Ch. 447; *Benjamin v. Storr* (1874), L. R. 9 C. P. 400; *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138.

(i) Public Health Act, 1875, s. 149 (urban authorities); Local Government Act, 1929, ss. 29 (2), 32 (1) (county authorities). Cp. *Edgington v. Swindon Corporation*, [1939] 1 K. B. 86 (statutory power to erect omnibus shelter).

(k) *Marshall v. Blackpool Corporation*, [1935] A. C. 16, at p. 22; cp. Cozens-Hardy, M.R., in *Tottenham U. D. C. v. Rowley*, [1912] 2 Ch. p. 644, approved by H. of L., S. C., [1914] A. C. 95.

highway are subject to this right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. . . . The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway."

2. This right of access to a highway by the occupier of land abutting upon it must be distinguished from the right of passing along the highway. The former is a private and the latter a public right, and for any infringement of the former an action will lie; whereas, as we shall see in the next section, no action will lie for an infringement of the public right of passage except on proof of some special or particular consequential damage suffered by the plaintiff.

3. The private right of access thus protected includes merely the right to get from the highway into the plaintiff's land, and from his land into the highway; and does not include a right to get to and from the plaintiff's land by going along the highway, for this is merely the public right of passage (1).

4. A disturbance of this private right of access may or may not be at the same time a disturbance of the public right of passage. A man's doorway may be obstructed by an act which in no way obstructs the use of the highway; and conversely the highway may be obstructed, while the right of access remains unaffected.

### § 69. Nuisance to a Highway

1. *Nuisance to a highway a misdemeanour.*—A nuisance to a highway is an act done without lawful justification whereby the exercise of the public right of passage is obstructed or rendered dangerous. The term nuisance is here used in the sense of public nuisance—i.e., an indictable misdemeanour. "In order to establish nuisance or obstruction in a public highway something which is indictable—a punishable offence—must be established" (m). In what circumstances such an act is also a civil wrong actionable at the suit of an individual we are about to consider.

2. *Kinds of nuisance to highway.*—A nuisance to a highway consists either in obstructing it or in rendering it dangerous.

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(1) See *Chaplin v. Westminster Corporation*, [1901] 2 Ch. 329.

(m) *The Carlgarth*, [1927] P. p. 102, per Bankes, L.J.

Examples of the first are stopping a highway by erecting a fence across it; narrowing it by a fence, scaffolding or hoarding (*n*) or building which projects beyond the boundary line; leaving horses and carts standing in it for an unreasonable time or in unreasonable number (*o*); collecting a crowd of people in it, as at a theatre door or a public meeting (*p*); making excavations or erections in it without lawful authority. Wrongful danger to the highway, on the other hand, may be caused either by something done in the highway itself or by something done on the land which adjoins it. Examples are leaving unlighted or unguarded an excavation or obstruction, even though lawfully created (*q*); keeping in the highway defective and dangerous tramway-lines, coal-plates, or cellar gratings (*r*); leaving on the highway or adjacent thereto matter on which passengers are likely to slip (*s*) or unusual objects calculated to frighten horses (*t*); allowing a house, fence, or other structure immediately adjoining the highway to become ruinous and dangerous (*u*); keeping unfenced an excavation so close to the highway as to be a danger in case of accidental deviation (*x*); keeping at a golf-club a hole where players are in the habit of slicing on to the highway (*y*).

3. *Dangers existing at time of dedication.*—When, however, a road is dedicated to the public, it is presumed to be so dedicated on the terms that the public right of passage is to be subject to all obstructions and dangers which exist at the time of dedication;

(*n*) *Harper v. Haden & Sons*, [1933] Ch. 298.

(*o*) *Benjamin v. Storr* (1874), L. R. 9 C. P. 400; *Fritz v. Hobson* (1880), 14 Ch. D. 542.

(*p*) *Barber v. Penley*, [1893] 2 Ch. 447; *Lyons, Sons & Co. v. Gulliver*, [1914] 1 Ch. 631. Cp. Goodhart, 6 Camb. L. J. pp. 161 *sqq.*

(*q*) *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72; *Ware v. Garston Haulage Co.*, [1944] 1 K. B. 30.

(*r*) See *Pretty v. Bickmore* (1873), L. R. 8 C. P. 401. *Aliter* with structures which are really part of the highway and are therefore to be repaired by the local authority and not by the adjoining occupiers: *Robbins v. Jones* (1863), 15 C. B. (N.S.) 221.

(*s*) *Dollman v. Hillman, Ltd.*, [1941] 1 A. E. R. 355 (fat from a butcher's shop). Contrast *Hughes v. Sheppard* (1940), 163 L. T. 177 (cans with red flags along white line down the centre of road).

(*t*) *Wilkins v. Day* (1883), 12 Q. B. D. 110; *Harris v. Mobbs* (1878), 3 Ex. D. 268; *Brown v. Eastern & Midland Ry. Co.* (1880), 22 Q. B. D. 391.

(*u*) *Harrold v. Watney*, [1898] 2 Q. B. 320; *Wilchick v. Marks*, [1934] 2 K. B. 56; *Owens v. Thomas Scott*, [1939] 3 A. E. R. 663; *Drake v. Bedfordshire C. C.*, [1944] K. B. 620.

(*x*) *Barnes v. Ward* (1850), 9 C. B. 392; *Hardcastle v. S. Yorkshire Ry.* (1859), 4 H. & N. 67; *Att.-Gen. v. Roe*, [1915] 1 Ch. 235. See also *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 83. But an unfenced dock basin forty-seven feet from the highway is not near enough to involve an obligation to fence it: *Caseley v. Bristol Corporation*, [1944] 1 A. E. R. 14.

(*y*) *Castle v. St. Augustine's Links* (1922), 88 T. L. R. 615.

and the adjoining owners and occupiers are therefore under no liability for maintaining such obstructions or dangers or for any mischief that may result from them (z). Nor are they liable for mere passive failure to prevent new dangers from arising on the highway or to give warning of their existence. *A fortiori* when something has been done on the highway itself which makes it dangerous there is no obligation on the occupier of the adjoining land to do away with the danger. Were it otherwise an intolerable burden would be put upon the occupiers of land adjoining highways (a). In these respects the public must look after itself (b).

4. *What amounts to indictable obstruction.*—A permanent obstruction erected in a highway without lawful authority is necessarily wrongful and constitutes a public nuisance at common law, as it in fact operates as a withdrawal of part of the highway from the public. A temporary obstruction is as a general rule wrongful unless it is negligible in point of time or authorised by Parliament or occasioned in the reasonable and lawful user of the highway as a highway (c). But not all obstructions of a highway are wrongful; were it otherwise no one could safely use a highway. "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others" (d). Thus a person has a right to obstruct a highway by the erection of scaffolding and hoardings for the purpose of repairing his house so long as the inconvenience to the public is necessarily so caused and does not offend either in *quantum* or duration, as was held in *Harper v. Haden & Sons* (e).

5. *Nuisance to a highway not actionable unless it cause special damage to individual.*—A nuisance to a highway amounts to a misdemeanour, and may be made the subject of an indictment at

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(z) *Fisher v. Prowse* (1862), 2 B. & S. 770.

(a) *Nicholson v. Southern Ry.*, [1935] 1 K. B. 558.

(b) *Brackley v. Midland Ry.* (1916), 85 L. J. K. B. 1596 (highway dangerous by reason of ice and snow); *Hudson v. Bray*, [1917] 1 K. B. 520 (tree blown down across the highway). Cp. Lord Greene, M.R., in *Maitland v. Raisbeck*, [1944] K. B. p. 693.

(c) *Harper v. Haden & Sons*, [1933] Ch. p. 308, *per* Lawrence, L.J.

(d) *S. C.* pp. 316-7, 320, *per* Romer, L.J.

(e) [1933] Ch. 298.

common law, or of some other criminal proceedings sanctioned by statute in particular classes of cases. It may also be restrained by injunction at the suit of the Attorney-General acting *ex officio* or at the relation of a local authority or any private person interested in the matter. But it is not *per se* actionable at the suit of a private person—a rule established for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause (f). No such action will lie save at the suit of a person who can show special and particular damage suffered by himself and distinct from the general inconvenience endured by him in common with the public at large (g).

6. *What damage is sufficient.*—The special damage that is necessary and sufficient to support an action must be of a substantial character, not fleeting or evanescent (h). It may be an injury to person or property, as when the plaintiff has broken his leg by falling over an obstruction in the highway. Thus in *Castle v. St. Augustine's Links* (i) a taxicab driver who lost his eye from a sliced golf-ball recovered damages from the golf-club whose hole was so near the highway as to be a public nuisance. Or it may be an injury to his pecuniary interests, as when he has incurred expense or suffered pecuniary loss by being prevented from using the highway. Thus in *Rose v. Miles* (k) the plaintiff, who complained of the obstruction of a navigable canal, was held to have a good cause of action on proving that he had been compelled to unload his goods from barges and carry them overland, thereby incurring additional expense. So in *Campbell v. Corporation of Paddington* (l) the occupier of premises abutting on a highway was held to have a good cause of action for the wrongful erection in the highway of a stand which obstructed the view of the highway from her windows and so prevented her from making profitable

(f) See Bl. Comm. iii, 219.

(g) *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316, 320, 322. The application of the law in this case, as distinct from the principle, seems to have been doubted by Greer, L.J.: *Blundy, Clark & Co. v. L. & N. E. Ry.*, [1931] 2 K. B. p. 364.

(h) *Benjamin v. Storr* (1874), L. R. 9 C. P. 400; *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. p. 153; *Harper v. Haden & Sons*, [1933] Ch. pp. 304, 308.

(i) (1922), 38 T. L. R. 615. So in *McKee v. Malcolmson*, [1925] N. I. 120, an action under the Fatal Accidents Act succeeded where the deceased met his death as a spectator at some motor speed trials, which rendered the highway on which they were held dangerous, and so were a nuisance.

(k) (1815), 4 M. & S. 101. Cp. *Iverson v. Moore* (1699), 1 Ld. Raym. 486; 12 Mod. 262; *Blundy, Clark v. L. & N. E. Ry.*, [1931] 2 K. B. 334.

(l) [1911] 1 K. B. 869.

contracts for the use of her premises for viewing Edward VII's funeral procession (m).

7. *Whether injury to business by obstructing highway is sufficient.*—In *Wilkes v. Hungerford Market Co.* (n) it was held that an action will lie even if the only special damage proved is an injury to the plaintiff's business, due to the fact that the obstruction to the highway has hindered the public from resorting to his business premises. In other words, it is said that the special damage may be suffered by the plaintiff not because he has been prevented from using the highway as beneficially as heretofore, but merely because other persons have been so hindered, so that the result of their hindrance is a loss suffered by himself. Some dicta in the House of Lords in *Ricket v. Metropolitan Ry.* (o) cast some doubt on this decision, but the better view seems to be that *Wilkes' Case* is still good law, and that *Ricket's Case* is merely a decision that the damage in that case brought under the Lands Clauses Act and the Railways Clauses Act was too remote to be recovered as damage to property (p). It is submitted therefore that damage done to the plaintiff in his trade by the illegal obstruction of a highway is an actionable wrong (q).

8. *Damage must be due to use of highway.*—Special damages can only be recovered if they are suffered as a result of the use of the highway. Thus in *Bromley v. Mercer* (r) a child playing in the

(m) So in *Medcalf v. Strawbridge, Ltd.*, [1937] 2 K. B. 102, it was held that the frontagers on a private road had a special interest in preventing damage to the road, when the defendants' servant was in the habit of using a skid pan and so destroying the surface, on the ground (*inter alia*) that the condition of the road affected the enjoyment and value of their houses. This seems equally applicable to a public road. See 54 L. Q. R. 12.

(n) (1835), 2 Bing. N. C. 281.

(o) (1867), 2 H. L. 175, at pp. 188 (Lord Chelmsford, L.C.) and 199 (Lord Cranworth).

(p) *Blundy, Clark & Co. v. L. & N. E. Ry.*, [1931] 2 K. B. 334; *Harper v. Haden & Sons*, [1933] Ch. 298. Greer, L.J., Lord Hanworth, M.R., and (*semble*) Scrutton, L.J., took the view in the text; Slessor, L.J., was *contra*, whilst Lawrence, L.J., would not commit himself.

(q) See also *Rose v. Groves* (1843), 5 M. & G. 613; *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Iveson v. Moore* (1899), 1 Ld. Raym. 436. This particular point was not taken in *Lyons, Sons & Co. v. Gulliver*, [1914] 1 Ch. 631 (theatre queue obstructing access). But perhaps such a case, though treated by the Court as a public nuisance, is really a private nuisance. (*Vide supra*, s. 53 (1).) Cp. Winfield, pp. 492-4; Pollock, p. 321.

(r) [1922] 2 K. B. 126. Some of the language used in the judgments is too restrictive of the plaintiff's rights to be consistent with the *Hungerford Market Co. Case*, *supra*, s. 69 (7). Cp. *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. 101.



yard of an hotel was injured owing to the dangerous state of a wall which was a public nuisance to persons using the highway. The child could not recover for her injuries. No right of hers was infringed so far as the use of the highway was concerned.

9. *Damage must be caused by the nuisance.*—In order that the plaintiff may recover there must be the relation of cause and effect between the nuisance and the damage. So if a person climbs upon a stationary vehicle which is left upon the highway to see a cricket match and falls off and injures himself, it is not relevant for him to complain that the van was an obstruction to the highway and a nuisance. The accident does not happen because the vehicle is an obstruction to the highway, but because the plaintiff has trespassed upon it (s).

10. *Damage to highway.*—We have already treated of liability for dangers created in the highway when dealing with the law relating to nuisance generally and with the liability for independent contractors (t).

### § 70. Liability for the Non-Repair of Roads (u)

1. *No liability for damage due to non-repair of roads.*—In the absence of an express statutory provision to that effect, no action will lie against any local authority intrusted with the care of highways for damage suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair; but this exemption from liability extends only to cases of pure non-feasance, and the local authority is responsible in damages for any active misfeasance by which the highway is rendered dangerous.

2. *History of rule.*—This is a particular application of the general principle, which will be considered later, that no action will lie for the breach of a statutory duty unless the Legislature in creating the duty intended this remedy to be available. At common law the duty of repairing highways rested upon the inhabitants of the parish, and was enforceable by way of indictment only, and not by way of action at the suit of an individual,

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(s) *Donovan v. Union Cartage Co.*, [1933] 2 K. B. p. 78, *per* Acton, J. And see *Liddle v. Yorkshire C. C.*, *ubi supra*.

(t) *Supra*, ss. 57 and 31 (4).

(u) For a full discussion of the authorities on this topic, see Robinson, *Public Authorities*, pp. 82-97.

even though he had suffered special damage (*x*). Nor would an action lie against a surveyor of highways appointed under statutory provisions, it being held that the Legislature did not intend to subject the surveyor, who was only the agent of the parish in this matter, to a liability from which the parish itself was free (*y*). Finally, when the care of highways was transferred by statute to corporate local authorities, the same rule of exemption was applied to them (*yy*). The duty of repair, in being thus transferred from the inhabitants at large to a body corporate, has not changed its nature, nor does the breach of it now, any more than formerly, confer any right of action upon injured individuals' (*z*).

8. *Exceptions to rule.*—This unsatisfactory (*a*) exemption from liability does not extend to every person or body upon whom liability to repair a road is thrown. It never extended to those who were liable to repair *ratione tenuræ* (*b*). It extends only to those who "are really the successors of and have really had transferred to them the duties and liabilities which originally rested on the inhabitants", who, in other words, "stand in their shoes" (*c*). It does not afford protection to dock companies (*d*), railway companies (*e*), or canal companies (*f*) taking tolls. Again, where a local authority, which happens to be a highway authority, is guilty of non-feasance in respect of something which it has done in the highway in some other capacity, *e.g.*, as sanitary authority, it is liable for non-feasance. The exemption does not

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(*x*) *Russell v. Men of Devon* (1788), 2 T. R. 667, where Ashhurst, J., said: "It is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now, if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy." But non-liability has been held in later cases to be the real ground of that decision: see *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. p. 344, *per* Humphreys, J. See also Denning in 55 L. Q. R. 343, and Winfield, 490.

(*y*) *Young v. Davis* (1862), 7 H. & N. 760; (1863), 2 H. & C. 197.

(*yy*) This passage was cited with approval by Humphreys, J., in *Swain v. Southern Ry.*, [1939] 1 K. B. p. 88.

(*z*) *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *Municipality of Pictou v. Geldert*, [1893] A. C. 524.

(*a*) *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. p. 346, *per* Humphreys, J. *Cp. Att.-Gen. v. Todmorden B. C.*, [1937] 4 A. E. R. p. 593, *per* Goddard, J.; *Swain v. Southern Ry.*, [1939] 2 K. B. p. 576; 59 L. Q. R. 103.

(*b*) *McKinnon v. Penson* (1853), 8 Exch. p. 327; 55 L. Q. R. 343.

(*c*) *Swain v. Southern Ry.*, [1939] 2 K. B. 560, 574.

(*d*) *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336.

(*e*) *Blundy, Clark & Co. v. L. & N. E. Ry.*, [1931] 2 K. B. 334; *Swain v. Southern Ry.*, [1939] 2 K. B. 560.

(*f*) *Parnaby v. Lancaster Canal Co.* (1839), 11 A. & E. 230.

extend to acts or defaults in connection with any duties except characteristic highway duties, such as that of repairing the road (g).

4. *Tramways.*—Nor does this exemption from liability extend to bodies, such as tramway companies, which are empowered to place lines or other structures in the streets on the terms that they shall keep the adjoining portions of the roadway in good repair. In such cases an action will lie at the suit of any person injured through the breach of this obligation (h). Nor will abandonment of the tram-line relieve those responsible from liability; the holder of a tramway franchise cannot divest himself of the responsibility which that franchise carries merely by ceasing to avail himself of it (i). Even if the statute giving them such powers is silent on the point, where under statutory authority a body of persons have interrupted a public highway, and there is a duty imposed on them to make some means of communication for the purpose of restoring the continuity of the highway, there is at common law also a duty to keep the substituted means of communication in repair (k).

*Contractors.*—Nor does the exemption cover contractors to a highway authority. "They do not become a highway authority because they act under a contract with a highway authority". Thus where the defendants under a contract with the highway authority in clearing up the debris resulting from a collision left a gap in some railings, it was held that they were not protected by the rule (l).

5. *Liability for act of misfeasance making road dangerous.*—The rule of exemption applies only to cases of mere passive non-feasance—mere omission to repair. It does not extend to an active misfeasance—a positive act by which a danger is wrongfully caused in the highway and by which the plaintiff has come to harm, as, for example, by making an excavation in the road (m) or by

(g) *Shoreditch Corporation v. Bull* (1904), 90 L. T. 210; *Skilton v. Epsom U. D. C.*, [1937] 1 K. B. 112 (traffic studs placed in the road under powers given by the Road Traffic Act, 1930); *Newsome v. Darton U. D. C.*, [1938] 3 A. E. R. 93; *Simon v. Islington B. C.*, [1943] K. B. p. 197.

(h) *Dublin Tramways Co. v. Fitzgerald*, [1903] A. C. 99; *Browne v. De Luxe Car Services*, [1941] 1 K. B. 549. So in the case of a bridge carried over a railway: *Swain v. Southern Ry.*, [1939] 2 K. B. 560.

(i) *Browne v. De Luxe Car Services*, [1941] 1 K. B. 549.

(k) *Hertfordshire C. C. v. G. E. Ry.*, [1909] 2 K. B. 403, 408, 413; *Oliver v. N. E. Ry.* (1874), L. R. 9 Q. B. 409. Sir John Salmond (9th ed., s. 76 (6), n. (p)) seems to have thought these cases irreconcilable with *Thompson v. Mayor of Brighton*, [1894] 1 Q. B. 332, and *Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462, but it is submitted those cases are not *in pari materia*.

(l) *Drake v. Bedfordshire C. C.*, [1944] K. B. 620, 626.

(m) *Newsome v. Darton U. D. C.*, [1938] 3 A. E. R. 93.

raising it improperly (n). Local authorities are saved from any civil liability for merely failing to do what ought to have been done, but are liable at common law for doing that which ought not to have been done (o).

*Non-repair of artificial structure in road.*—It is a misfeasance within the meaning of this rule, and not a mere non-feasance, to erect or place in the highway any artificial structure which is not itself a part of the highway, and then to allow that structure, as opposed to the highway itself, to fall into a dangerous state of disrepair (p). Thus, in *White v. Hindley Board of Health* (q), a local board of health, having charge both of the road and of the sewers beneath it, was held liable for allowing the grating of a sewer to become so worn as to become a nuisance to the highway, whereby the plaintiff suffered an injury. It is a positive misfeasance deliberately to maintain *in situ* things foreign to the highway, such as tram-lines, which are dangerous (r).

*No liability for non-repair of bridge.*—It seems that a bridge is not an artificial structure in the highway within the meaning of this rule, but is itself a part of the highway, and that there is no liability for its non-repair (s). But in *Guilfoyle v. Port of London Authority* (t) it was held that a swing-bridge was not in the ordinary sense a highway.

6. *Artificial structure dangerous only because of non-repair of road.*—If the danger is caused not by any defect in the artificial structure itself, but solely by the wearing away or disrepair of the highway, whereby the structure is rendered a source of danger, there is no liability at all : none in respect of the artificial structure, for it is not defective ; and none in respect of the road, for the case is merely one of non-feasance. Thus, in *Thompson v. Mayor of*

(n) *Att.-Gen. v. Todmorden B. C.*, [1937] 4 A. E. R. pp. 595-6. So also taking away and not replacing railings guarding a drop from the highway: *Drake v. Bedfordshire C. C.*, [1944] K. B. 620.

(o) *Foreman v. Mayor of Canterbury* (1871), L. R. 6 Q. B. 214; *Shoreditch Corporation v. Bull* (1904), 90 L. T. 210; *McClelland v. Manchester Corporation*, [1912] 1 K. B. 118; *Thompson v. Bradford Corporation*, [1915] 3 K. B. 13. See also s. 135 (2), *infra*.

(p) For a collection of the cases on the distinction between misfeasance and non-feasance in this connection, see Robinson, *Public Authorities*, pp. 183-97.

(q) (1875), L. R. 10 Q. B. 219. Cp. also *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433.

(r) *Simon v. Islington B. C.*, [1948] K. B. p. 197.

(s) *Municipality of Picton v. Geldert*, [1893] A. C. 524. But see *Swain v. Southern Ry.*, [1939] 2 K. B. 560.

(t) [1932] 1 K. B. 336.

*Brighton (u)* the plaintiff was riding along a public road, and his horse's foot struck the cover of an entrance to a sewer, whereby the horse was thrown down and injured. The cover was in perfect order, but projected an inch or so above the surface of the road owing to the wearing away of the latter. The defendants were held not liable, on the ground that the cause of the accident was a mere omission to repair the road.

Where the artificial structure which causes the accident has been placed in the highway, not by the local authority having charge of the highway, but by some other person or body lawfully authorised thereto—for example, a waterworks company or a tramway company—the same principles apply. If the structure is itself in disrepair, the persons who placed it there are responsible for it (*x*); and if the structure is in good order, but dangerous through the disrepair of the road, no one is responsible at all (*y*), unless, indeed, as in the case of a tramway company (*z*), the persons authorised to place the structure in the road have at the same time a statutory obligation imposed upon them to keep the adjoining portions of the road in good repair (*a*) (*b*).

7. Where a local authority is engaged in road improvements and a road is not yet dedicated to the public, the authority will be liable for any injury caused by a trap to any person going on the road by the invitation of the authority. The liability would seem to be that of the licensor to the licensee (*c*). If the authority has not give such an invitation, expressly or impliedly, the person going on the road is a trespasser (*d*).

(*u*) [1894] 1 Q. B. 332.

(*x*) *Chapman v. Fylde Waterworks Co.*, [1894] 2 Q. B. 599. *Aliter* when the responsibility is otherwise determined by any statutory provision: *Batt v. Metropolitan Water Board*, [1911] 2 K. B. 965.

(*y*) *Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462.

(*z*) *Supra*, s. 70 (4).

(*a*) *Dublin Tramways Co. v. Fitzgerald*, [1903] A. C. 99; *Hartley v. Rochdale Corporation*, [1908] 2 K. B. 594.

(*b*) As to the liability of a local body for accidents caused by the unlighted condition of its streets, *vide supra*, s. 9 (6).

(*c*) *Vide infra*, s. 130. In *Oldham v. Sheffield Corporation* (1927), 43 T. L. R. 222, the liability is spoken of as the liability of invitor to invitee, but that would seem to be *per incuriam*. Contrast *Coleshill v. Manchester Corporation*, [1928] 1 K. B. 776.

(*d*) *Liddle v. Yorkshire (North Riding) C. C.*, [1934] 2 K. B. p. 112.

## CHAPTER IX

*CONVERSION, DETINUE AND TRESPASS TO GOODS*

## § 71. History of the Action of Trover

1. The wrong of conversion is so dependent for a due understanding of its true nature and incidents upon a knowledge of its origin and historical development that before attempting any systematic exposition of the present law it is necessary to give an outline of the mode in which it has come into existence.

2. *Conversion defined.*—If we seek for a definition of this wrong, we may find it in the form of declaration provided for the action of trover by the Common Law Procedure Act, 1852 (a). By this enactment the form of the action was brought into harmony with its true scope and purpose by the abolition of the old fictitious allegations on which it was based; and a new form of declaration was provided, in which it was simply alleged that “the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff’s goods”. This is the essence of the matter. The wrong of conversion consists in an act of wilful interference, without lawful justification, with a chattel in a manner inconsistent with another’s right, whereby that other is deprived of the use and possession of it.

*Three modes of conversion.*—There are three distinct methods in which one man may deprive another of his property, and so be guilty of a conversion and liable in an action of trover—(1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it. In the first case the wrongdoer acquires a possession which is wrongful *ab initio*. In the second he acquires possession rightfully but retains it wrongfully. In the third case he neither takes it wrongfully nor detains it, but so acts that it is lost to the true owner. The term conversion was originally limited to the third of these cases. To convert goods meant to dispose of them, to make away with them, to deal with them, in such a way that neither owner nor wrongdoer has any further possession of them: for example, by consuming them, or by destroying them, or

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(a) S. 49, and Sched. B.

by selling them, or otherwise delivering them to some third person. Merely to *take* another's goods, however wrongfully, was not to convert them. Merely to *detain* them in defiance of the owner's title was not to convert them. An article was converted to the use of the thief when it was used by him; food, when it was eaten; jewels, when they were pawned or sold. The fact that conversion in its modern sense includes instances of all three modes in which a man may be wrongfully deprived of his goods, and not of one mode only, is the outcome of a process of historical development whereby, by means of legal fictions and other devices, the action of trover was enabled to extend its limits and appropriate the territories that rightly belonged to other and earlier forms of action.

3. *Trespass, detinue, and trover*.—Corresponding to these three modes of wrongful deprivation there were three distinct forms of action provided by the law—(1) *trespass de bonis asportatis*, for wrongful taking; (2) *detinue*, for wrongful detention; and (3) *trover*, for wrongful conversion (that is to say, disposal). Of these three actions, trover is the most recent in origin. Trespass and detinue date from the beginnings of our legal system, but trover is a later invention. An early instance—perhaps the earliest—occurs in 1479 (b): “In an action on the case the plaintiff declared how he bailed certain boxes of money to the defendant to be safely kept, and how the defendant broke them *et eux convert a son oepe*.” In 1551 we find the action in its modern form: “Action on the case that the plaintiff was in possession of such and such goods *ut de propriis et illa perdidit et def. illa invenit et illa in usum proprium convertit*” (c).

It is not to be supposed, however, that there was no remedy at all for a conversion before the invention of trover in the fifteenth century. Before this remedy was heard of, its work was doubtless done by detinue. For the defendant in detinue, charged with unjustly detaining the goods of the plaintiff, was not suffered to object that he had already converted and disposed of them, and therefore that he no longer detained them. In *Jones v. Dowle* (d) this very defence was pleaded in detinue, and it was said by Parke, B.: “Detinue does not lie against him who never had possession of the chattel, but does lie against him who once had but has improperly parted with the possession of it.” This being so, it is

(b) Y. B. 18 Edw. IV, 23 pl. 5.

(c) Brooke's Abridg., *Action sur le case*, pl. 113.

(d) (1841), 9 M. & W. 19. Cp. *Reeve v. Palmer* (1858), 5 C. B. (N.S.) at p. 91.

clear that detinue was available as a remedy for wrongful conversion as well as for wrongful detainer.

*Reasons for the invention of trover.*—Why, then, was the new remedy of trover invented? In the first place, detinue did not afford a remedy if the bailee misused the chattels, or if he restored them in a damaged condition, nor could damages be obtained against a third person who had destroyed the goods in an action of detinue. In such cases the only remedy was by trespass on the case (e). Secondly, detinue was an exceedingly unsatisfactory form of action, for the defendant had the right of defending himself by wager of law, a form of licensed perjury which reduced to impotence all proceedings in which it was allowable. The ingenuity of pleaders, therefore, was devoted to avoiding all forms of action in which wager of law was admitted, and to inventing other forms of action which should take their place, and in which a plaintiff might have the benefit of the verdict of a jury. Hence the action of trover as a remedy for conversion. Conversion came to be treated for the first time as an independent wrong—to be sued for in a special form of trespass on the case. It was no longer treated as a mere incident of a wrongful detention, to be sued for in the action of detinue. For trespass on the case led to the verdict of a jury on a plea of not guilty, and a plaintiff might hope for justice; but detinue led to nothing but defeat by the defendant's wager at law. Just as *indebitatus assumpsit* was substituted for debt, so trover was substituted for detinue.

4. *The form of declaration in trover.*—The declaration in trover was simply a variant of the declaration in detinue, the only material difference being that in trover the defendant was charged with wrongly converting the property to his own use, while in detinue he was charged with unjustly detaining it. Detinue was of two kinds, distinguished as *detinue sur bailment* and *detinue sur trover*. The former was the appropriate remedy when the property had come to the defendant's hands by a bailment or contract between the parties. The latter, or *detinue sur trover*—which is not to be confounded with the action of trover itself—was appropriate when the defendant had found the goods, or indeed had come by them in any other fashion save by contract with their owner. These allegations of bailment or finding were, however, immaterial and untra-

(e) See Holdsworth, H. E. L., iii, 350, and authorities there cited.



versible (f). Usually it mattered nothing in what manner the defendant had obtained possession of the property (g). Indeed, the older mode of pleading was to make no allegation in the matter, save that the goods of the plaintiff had come to the defendant's hands (*devenuerunt ad manus*) and were unjustly detained by him (h). In 1455 (i) we find an action of *detinue sur trover* in which the specific allegation of finding (declaration *per inventionem*) is criticised by Littleton as a novelty—"a new-found Haliday". The only issues were whether the goods were the property of the plaintiff, and whether the defendant unjustly detained them.

The action of trover and conversion was modelled upon that of *detinue sur trover*. The plaintiff alleged in his declaration (1) that he was possessed of certain goods *ut de bonis propriis*; (2) that he casually lost them, and that the defendant found them; and (3) that the defendant did not restore them, but wrongfully converted them to his own use. As in *detinue*, so in *trover*, this second allegation as to losing and finding was in most cases a mere fiction; in any case it was immaterial and untraversable. Nor was it ever essential. The plaintiff might have alleged a bailment instead of a loss and finding, thus modelling his declaration on *detinue sur bailment* instead of on *detinue sur trover* (k). Or a general allegation of *devenuerunt ad manus defendantis* would have been good enough. It must not be supposed that the action of trover was specially or originally designed to meet the case of an actual loss and finding. The allegation of loss and finding was from the beginning merely a form of pleading imitated from the action of *detinue*.

5. *Extension of the scope of trover*.—Such, then, was the origin of the action of trover, and so far as we have gone with the story the matter stands thus: there are three modes in which a man may be deprived of his property, and three corresponding forms of action provided for his relief. If his property is wrongfully taken, he may sue in trespass; if it is wrongfully detained, he

(f) Brooke's Abridg., *Detinue*, pl. 50; *Gledstane v. Hewitt* (1831), 1 C. & J. 565; Chitty's Pleadings, I, 138; II, 428 (7th ed.); *Smart Bros. v. Holt*, [1929] 2 K. B. p. 309.

(g) But in this action of *detinue sur bailment* it was no defence that the defendant had not got it in his power to return the property, whilst it was a good answer to an action of *detinue sur trover* that the defendant had lost possession without wrongful act before the action was brought: Y. B. 27 Hen. VIII, f. 19, pl. 35.

(h) For references see Holdsworth, H. E. L., iii, 326-7.

(i) Y. B. 33 Hen. VI, f. 27, pl. 12.

(k) *Gumbleton v. Grafton* (1601), Cro. Eliz. 781.

may sue in detinue; and if it is wrongfully converted he may sue either in detinue, as was the older practice, or in trover in accordance with the new. No sooner, however, has trover become thus established than it begins to extend its boundaries, and it very rapidly succeeds in appropriating almost the whole territory both of trespass and of detinue. It becomes a general remedy applicable in almost all cases in which a plaintiff has been deprived of his goods, whether by way of taking, by way of detention, or by way of conversion in its proper and original sense. In most cases of wrongful taking the plaintiff might elect between trespass and trover, and in most cases of detention he might elect between detinue and trover. We have now to see how this extension was effected (*l*).

6. *Conversion by detention: trover and detinue.*—It is clear that a mere detention is not a conversion in the original sense. Just as a man cannot both eat his cake and have it, so he cannot convert another's goods to his own use and at the same time detain them. Nevertheless it was settled at an early date in the history of trover that a neglect or refusal to deliver up a chattel, after demand made, is *evidence* of a conversion—evidence, that is to say, that the defendant has already made away with the property and therefore cannot and does not restore it. Moreover, this evidence was received as sufficient and conclusive in the absence of any proof that the failure to deliver was justified. The defendant was not suffered to prove that, although he had unlawfully refused to deliver up the property, he had not converted it but still retained it. Juries were directed as a matter of law to find a conversion on proof of demand and refusal without lawful justification. So in *Alexander v. Southey* (*m*) Best, J., said: "An unqualified refusal is almost always conclusive evidence of a conversion" (*n*).

So soon as this rule had been established, it was clear that trover had passed beyond its original scope, and had become almost (*o*) concurrent with detinue. These two forms of action had now become alternative remedies; detention after demand made had now become a constructive or fictitious conversion—a

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(*l*) The best account of this process of extension is to be found in Holdsworth, *H. E. L.*, vii, 402-21.

(*m*) (1821), 5 B. & Ald. p. 250.

(*n*) Cp. Co. Rep., x, 56 b; Bl. Comm., iii. 153. Perhaps the earliest case in which the rule was laid down is *Eason v. Newman* (1595), Cro. Eliz. 495.

(*o*) Not quite: *vide infra*, p. 284, and ss. 72 (2), 81 (1) (2).

conversion in law, though not in fact (*p*)—on which the plaintiff might bring his action of trover if he would. In this way he used to avoid the disadvantages inherent in detinue.

*Detention not now mere evidence of conversion.*—This doctrine that a detention after demand is merely evidence of a conversion, and not a conversion itself, is often set forth as a subsisting rule of law even at the present day. “The mere fact,” it is said (*q*), “of a refusal in answer to a demand is never of itself a conversion, though it may be very strong evidence of it.” Now that its historical basis has disappeared and been forgotten, however, such a statement is merely a source of complexity and confusion. It is necessary to acknowledge frankly that the term conversion is now used in a wide sense to mean any act by which another person is deprived of his property, and that to detain property without lawful justification is a conversion of it, no less than to destroy it or to make away with it. There is no reason for retaining in our modern law a distinction which was in its origin merely a pleader’s device to justify the use of trover instead of detinue. Even in comparatively early times we find Judges prepared to rationalise the law in this respect, and to eliminate the fictitious elements from the law of trover. Thus, in *Baldwin v. Cole* (*r*) Holt, C.J., says, “The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it as has been holden”. This view, however, did not prevail, although there was much conflict on the point (*s*).

*Negligent loss of chattels not conversion.*—Notwithstanding this extension of the original scope of trover, there remained even to the last one respect in which the action of detinue was of wider application. Detinue was available not only when there was a real detention of a chattel (*i.e.*, a refusal to deliver it, while it still remained in the possession or power of the defendant), but also where the defendant was unable by his own fault to make delivery, whether this fault consisted in a wilful act of wrongful disposition or in mere negligence leading to the loss or destruction of the chattel. Thus, a bailee who negligently allowed the goods to be stolen from him, or to be destroyed while in his possession, could

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(*p*) *Alexander v. Southey*, 5 B. & Ald. 247, *per* Abbott, C.J.

(*q*) Cl. & L. p. 320.

(*r*) (1704), 6 Mod. 212.

(*s*) See *Eason v. Newman* (1595), Cro. Eliz. 495; *Wilson v. Chambers* (1632), Cro. Car. 262; *Mires v. Solebay* (1678), 2 Mod. 242; 10 Co. Rep. 56b; *Isaac v. Clarke* (1614), 1 Ro. Rep. 126.

be sued in detinue as for the detention of them (*t*). But he could not be sued in trover as for a conversion, for there was no conversion unless he had wilfully disposed of the property (as by delivering it to another person) or unless he refused to deliver it on request while he still had it in his possession (*u*).

7. *Conversion by taking: Trover and Trespass.*—We have now seen how the new remedy of trover was extended to cover the ground of detinue, and it remains to notice the process by which it became almost concurrent with trespass *de bonis asportatis* also. The allegations of loss and finding being immaterial and untraversable, it mattered nothing in what way the property came to the defendant's hands. Whether it was by bailment, or by finding, or by tortious taking was irrelevant, if an actual or constructive conversion could be proved. Therefore, when goods were taken and converted, the plaintiff had an election either to sue in trespass for the taking, or, waiving the trespass, to sue in trover for the conversion. This was settled, not indeed without difficulty, in the case of *Bishop v. Viscountess Montagu* (*w*): "Although trespass lies, yet he may have this action if he will, for he hath his election to bring either." There soon developed a strong current of dicta to the effect that trover would lie in all cases of an unlawful taking. So in *Cooper v. Chitty* (*x*) Lord Mansfield said of the action of trover: "In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongly converted by another to his own use. The form supposes the defendant may have come lawfully into the possession of the goods. The action lies and has been brought in many instances where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten." Serjeant Williams summed up the authorities: "Whenever trespass for taking goods will lie—that is, where they are taken wrongfully—trover will also lie" (*y*).

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(*t*) *Jones v. Dowle* (1841), 9 M. & W. 19; *Reeve v. Palmer* (1858), 5 C. B. (N.S.) 84.

(*u*) *Williams v. Gesse* (1837), 3 Bing. N. C. 849.

(*w*) (1599), Cro. Eliz. 824; (1604), Cro. Jac. 50; cp. *Kinaston v. Moore* (1605), Cro. Car. 89.

(*x*) 1 Burr. p. 31. Cp. Lord Wright, M.R., in *Sutherland Publishing Co. v. Caxton Publishing Co.*, [1936] Ch. p. 335.

(*y*) *Wilbraham v. Snow*, 2 Wms. Saund. 47aa; see also *Chitty's Pleading*, I, 172 (7th ed.); 3 Salk. 365; *Bruen v. Roe* (1665), 1 Sid. 264. Sir John Salmond himself accepted these authorities as correctly stating the law (6th ed., pp. 373-4), but the position seems untenable, see Holdsworth, H. E. L., vii, 414-21.

But in 1718, Pratt, C.J., in *Bushel v. Miller* (z), held that there was no conversion in a case in which the defendant had committed a trespass against the plaintiff's goods by moving them from one place to another without in any way asserting any dominion over them. That view has prevailed, and it is now settled law that the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion (a).

In the result, therefore, whilst the action on the case of trover has superseded the old action of *detinue sur trover* (b), it has not superseded, although it has largely encroached upon the sphere of, the action of trespass *de bonis asportatis*.

8. Such, then, is the history of trover and of its relations to the earlier actions of trespass and detinue. "The law of England as to trover and conversion is, in many senses, a very technical law, and it is largely put aside now in modern times" (c). We now proceed to consider systematically the modern law of conversion.

## § 72. Conversion Defined

1. *Conversion in general*.—A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it.

Two elements are combined in such interference: (i) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and (ii) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right (d). But where the act done is necessarily a denial of the other's right or an assertion of a right inconsistent with it, intention does not matter. Conversion may consist in an act intentionally done inconsistent with another's right, though the doer may not know of or intend to challenge the property or possession of that other (d).

(z) 1 Str. 128.

(a) *Burroughes v. Bayne* (1860), 5 H. & N. p. 306, *per* Channell, B.; *Fouldes v. Willoughby* (1841), 8 M. & W. 540; *Hollins v. Fowler* (1875), L. R. 7 H. L. 767; *Kirk v. Gregory* (1876), 1 Ex. D. 55.

(b) But not of *detinue sur bailment*: *vide infra*, s. 81.

(c) *Per* Viscount Dunedin in *Leitch & Co. v. Leydon*, [1931] A. C. p. 102. *Cp. Oakley v. Lyster*, [1931] 1 K. B. 148.

(d) *Lancs and Yorkshire Ry. v. MacNicol* (1919), 88 L. J. K. B. 601, 605; *Oakley v. Lyster*, [1931] 1 K. B. 148; *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 202, *per* Lord Porter; S.C. p. 189, *per* Lord Russell.

2. *No conversion without wilful interference.*—In order to amount to conversion the act done with respect to the chattel must have been one of wilful and wrongful interference. He who so interferes with a chattel acts at his own risk, and if the loss of the chattel does in fact (whether intended or not) result from his act he is liable for the value of it in an action of trover. In the absence, however, of a wilful and wrongful interference there is no conversion, even if by the negligence of the defendant the chattel is lost or destroyed. Thus in *Ashby v. Tolhurst* (e) a car-park attendant allowed a stranger, who had neither the ticket nor the key for a car which had been left in the parking-ground for payment, to take the car away. His employers were not liable to the owner of the car for conversion. So, a carrier or other bailee who by accident loses the goods intrusted to him was by the old practice not liable in trover, but merely in detinue or assumpsit (f). But if he wrongfully and mistakenly delivered the chattel to the wrong person, or refused to deliver it to the right person, he could be sued as for a conversion (g). This distinction is not a mere matter of form or a technicality of the old law of procedure, but a subsisting principle of modern substantive law (h).

3. *Mistake no defence.*—Although a conversion is necessarily an intentional wrong in the sense already explained, it need not be knowingly wrongful. A mistake of law or fact is no defence to any one who intentionally interferes with a chattel. He does so *suo periculo*, and takes the risk of the existence of a sufficient lawful justification for the act; and if it turns out that there is no justification, he is just as responsible in an action of trover as if he had fraudulently misappropriated the property. "Persons deal with the property in chattels or exercise acts of ownership over them at their peril" (i). Thus, an auctioneer who honestly and ignorantly sells and delivers property on behalf of a customer who has no title to it is liable for its value to the true owner, even though he has already paid the proceeds of the sale to his own client (k). So in the leading case of *Hollins v. Fowler* (l) the defendant, a cotton broker, honestly purchased from a person who

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(e) [1937] 2 K. B. 242.

(f) *Williams v. Gesse* (1887), 3 Bing. N. C. 849.

(g) *Infra*, s. 73 (8), n. (s).

(h) *Cp. The Arpad*, [1934] P. pp. 231-2.

(i) *Hollins v. Fowler* (1874), L. R. 7 Q. B. p. 639, *per* Cleasby, B.

(k) *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; *Barker v. Furlong*, [1891] 2 Ch. 172.

(l) (1875), L. R. 7 H. L. 757. *Cp. Ellis v. Stenning*, [1932] 2 Ch. 81.

had obtained possession of it by fraud certain cotton belonging to the plaintiff, and forthwith sold and delivered it to a manufacturer, receiving merely a broker's commission on the transaction. On being sued in trover by the true owner, the broker was held by the House of Lords to have no defence and to be liable for the full value of the property.

And mistake is no defence even if it has been induced by the negligence of the plaintiff, unless the negligence consists of a breach of duty owed by the plaintiff to the defendant and is the proximate cause of the loss (*m*). Scrutton, L.J., said (*n*): "If my butler for a year has been selling my vintage wines cheap to a small wine merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion." Such a person is merely "negligent as regards himself" (*o*), and the defendant cannot successfully plead that he has been "lulled to sleep" by the plaintiff's failure to detect the earlier frauds (*p*).

4. *Remoteness of damage no defence*.—If the defendant has thus intentionally interfered with a chattel without lawful justification, and a loss of the chattel does in fact result from the interference, it is no defence that such a loss was not intended, or even that it was not the natural or probable result. The question is not whether the defendant intended to deprive the plaintiff of his property, or whether he knew or ought to have known of the probability of such a result, but merely whether his wrongful interference did as a matter of fact produce that result. In *Hiort v. Bott* (*q*) the plaintiffs, by a mistake fraudulently induced by their own agent, consigned certain barley to the defendant which he had not ordered, and they sent him a delivery order to enable him to obtain it from the carrier. The plaintiffs' agent thereupon informed the defendant that the consignment was a mistake, and induced him to indorse and hand over the delivery order to him (the agent) in order that the goods might be obtained by him from the carrier and redelivered to the plaintiffs. The agent thus

(*m*) *Bank of Ireland v. Evans' Trustees* (1855), 5 H. L. C. 389. *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175.

(*n*) *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. p. 60.

(*o*) *Per Blackburn, J.*, in *Swan v. North British Australasian Co.* (1863), 2 H. & C. p. 181. *Cp. per Parke, B.*, in *Bank of Ireland v. Evans' Trustees* (1855), 5 H. L. C. at p. 411.

(*p*) *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. 40, where the Court disapproved on this point *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, *contra*.

(*q*) (1874), L. R. 9 Ex. 86.

obtained possession of the barley, sold it, and absconded with the proceeds; and the defendant was held liable in trover for its value (r).

5. *Defendant need not have acted on his own account.*—It is not necessary that the defendant should have acted on his own account, or have converted the goods to his own use. He is equally liable if he has acted on behalf of some other person as his agent or servant. In *Stephens v. Elwall* (s) a servant was held liable for dealing with goods for his master's benefit and under his master's orders, although he acted under an unavoidable ignorance. On the other hand, a merely ministerial dealing with the goods at the request of an apparent owner having the actual control of them is not a conversion (t). In such a case the agent is a "mere conduit pipe" (u). It is by no means easy to find the exact line of delimitation in these cases (w). Even when the act is done for the supposed benefit of the true owner and with the honest intention of preserving or restoring the property, it will amount to a conversion if done without lawful justification, and if it results in fact in a loss of the property: as if I find A's goods which I wrongly believe to have been lost or mislaid by him, and hand them to B to take to A, and B misappropriates them (x).

6. *Loss need not be permanent.*—The loss or deprivation of possession suffered by the plaintiff need not be permanent (y). The duration of the dispossession is relevant with respect to the measure of damages, but makes no difference in the nature of the wrong (z).

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(r) *Sed qu.* whether there was any act of wrongful interference in this case at all. Is not an involuntary bailee entitled to return the goods, and does he owe any duty to the owner save one of reasonable care? Hawke, J., gave an affirmative answer to Salmond's first question in *Elvin and Powell v. Plummer Roddis* (1933), 50 T. L. R. 158, where upon similar facts it was admitted that there was no intention on the part of the defendants to have possession of the goods.

(s) (1815), 4 M. & S. 259. Cp. *Morison v. London County and Westminster Bank*, [1914] 3 K. B. p. 386, per Phillimore, L.J.; *Fenton Textile Association v. Thomas* (1929), 45 T. L. R. 264.

(t) *Heald v. Carey* (1852), 11 C. B. 977; *National Mercantile Bank v. Rymill* (1881), 41 L. T. 767; *Hollins v. Fowler* (1875), L. R. 7 H. L. p. 767, per Blackburn, J.

(u) *Hollins v. Fowler* (1875), L. R. 7 H. L. p. 789, per Grove, J.

(w) *Underwood v. Bank of Liverpool*, [1924] 1 K. B. pp. 790-1, per Scrutton, L.J. It would seem that the servant is only excused if the apparent owner has actual possession; not if he merely has an apparent right to possession. *Infra*, s. 74 (3).

(x) See also *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; *Barker v. Furlong*, [1891] 2 Ch. 172; *Cochrane v. Rymill* (1879), 40 L. T. 744.

(y) Chitty's Precedents in Pleading, 662 (3rd ed.); *Countess of Rutland's Case* (1695), Rolle Ab., *Action sur Case*, p. 5.

(z) *Baldwin v. Cole* (1704), 6 Mod. 212.



## § 73. Acts amounting to Conversion

1. *Wrongful taking usually a conversion.*—Every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of any one else, with the intention of exercising a permanent or temporary dominion over it. “Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion” (a). It is no defence that restoration has become impossible, even though no permanent taking was intended, and even though the impossibility has resulted from no act or default of the defendant, but solely through the loss or destruction of the property by some inevitable accident or the wrongful act of some third person. For he who wrongfully takes possession of another’s goods has them at his own risk, and must in all events either return them or pay for them (b).

2. *Wrongful taking not always a conversion.*—But a mere taking unaccompanied by an intention to exercise such a dominion is no conversion, though it is actionable as a trespass *de bonis asportatis*. So the mere act of wrongfully removing a chattel from one place to another, without intent to assume possession of it or to deprive the owner of possession, is not in itself a conversion, but is mere trespass. Thus in *Fouldes v. Willoughby* (c) the plaintiff went on board the defendant’s ferry-boat, having with him two horses; the defendant wrongfully refused to carry the horses, and told the plaintiff that he must take them ashore. The plaintiff refused to do so, and the defendant took the horses from him and put them on shore. The plaintiff remained on board the ferry-boat and was conveyed across the river. In an action of trover it was held that the mere act of removing the horses from the boat, although wrongful, and actionable as a trespass, did not amount to the wrong of conversion. “The simple removal of these horses by the defendant”, said Lord Abinger (d), “for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses” (e).

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(a) *Fouldes v. Willoughby* (1841), 8 M. & W. p. 548, *per* Alderson, B.

(b) *Supra*, s. 72 (4).

(c) (1841), 8 M. & W. 540.

(d) *Ibid.* at p. 547.

(e) The *dicta* to the effect that wherever trespass *de bonis asportatis* will lie, trover also will lie, by Serjeant Williams in his notes to *Wilbraham v. Snow*, 2 Wms. Saund. 47a, p. 129, and of Parke, J., in *Norman v. Bell* (1831), 2 B. & Ad.

3. *Detention no conversion unless adverse.*—The detention of a chattel amounts to a conversion only when it is adverse to the owner or other person entitled to possession—that is to say, the defendant must have shown an intention to keep the thing in defiance of the plaintiff (*f*). Merely to be in possession of a chattel without title is not a conversion (*g*), nor indeed is it a tort of any kind. Thus, if a bailee merely holds over after the end of the period for which the chattel was bailed to him, he may be liable for a breach of contract, but he is not guilty of conversion or of any other tort. So he who finds a chattel lost cannot be sued for a conversion, however long he keeps it, unless by refusing to give it up or in some other way he shows an intention to detain it adversely to the owner. No one is bound, save by contract, to take a chattel to the owner of it; his only obligation is not to prevent the owner from getting it when he comes for it.

This rule is not a mere peculiarity of the action of trover, for it is equally applicable to all forms of action in tort which are based on the detention of a chattel (*h*).

4. *Demand and refusal.*—The usual method of proving that a detention is adverse within the meaning of this rule is to show that the plaintiff demanded the delivery of the chattel, and that the defendant refused or neglected to comply with the demand (*i*). Demand and refusal, however, is not the sole method in which an adverse detention may be proved. If wrongful detention can be established without proving a demand there is a good cause of action (*k*). Presumably any conduct of the defendant which shows that he not merely possesses the goods, but intends to hold them in defiance of the plaintiff, and to deprive him of the possession of them, is sufficient to constitute a conversion, even though there has been no formal demand of restitution. Thus if a person is entrusted with a pipe of wine and bottles the wine for his own consumption there is some evidence of a conversion even though none of the wine be actually drunk (*l*).

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p. 192, although they gained the adhesion of Sir John Salmond, must be regarded as too wide. See the conclusive discussion of this point: Holdsworth, *H. E. L.*, vii, 416–21, *supra*, s. 77 (7); and *cp.* Lord Blanesburgh in *Leitch & Co. v. Leydon*, [1931] A. C. pp. 103–9.

(*f*) *Clayton v. Le Roy*, [1911] 2 K. B. 1081.

(*g*) *Cazton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 202, *per* Lord Porter.

(*h*) *Vide infra*, s. 81 (3).

(*i*) *Wms. Saund.* II, 47, i.

(*k*) *London Jewellers v. Sutton* (1934), 50 T. L. R. 193.

(*l*) *Philpott v. Kelley* (1835), 3 A. & E. 106.

5. *Delay due to doubt as to title.*—Adverse detention does not necessarily involve any knowledge of the plaintiff's title. Detention under an honest but mistaken claim of right on the part of the defendant is just as much a conversion as is a fraudulent purpose to keep another's property. Where, however, there is a genuine doubt in the defendant's mind as to the ownership of chattels, a temporary and provisional refusal to deliver them to a claimant, pending inquiries into his title, is justifiable, and is neither a conversion nor any other kind of wrong. No person is bound to deliver forthwith to the first claimant on peril of being sued for a conversion. In such cases it is a question of fact for a jury whether there was an honest doubt as to the title, and whether the delay was reasonably required for the purpose of making the needful inquiries (m).

6. *Adverse detention but no conversion.*—It is possible that in one case there is no conversion even though there is an adverse detention. If A's chattel comes on to B's land neither by accident, nor by the act of B nor by the act of a felonious third party, it is probably the law that B is not guilty of a conversion, even though he will not either allow A to retake his chattel or himself restore it, provided that no inference can be drawn from his attitude of an assertion of title or an exercise of dominion over the goods (n).

7. *Chattel must be in defendant's possession.*—A failure to deliver up goods on demand is not in itself a conversion if at the time of the demand they are no longer in the power or possession of the defendant: as when they are already destroyed or consumed, or have already got into the possession of some other person. No one can convert a chattel by refusing to give it up when he no longer has it, and this is so even if it is due to his own act or default that delivery is no longer possible (o), though he may be liable for some prior act of conversion.

8. *Conversion by wrongful delivery.*—Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by delivering them to some one else so as to change

(m) *Alexander v. Soulhey* (1821), 5 B. & Ald. 247; *Burroughes v. Bayne* (1860), 5 H. & N. 296; *Clayton v. Le Roy*, [1911] 2 K. B. 1031.

(n) *Supra*, s. 44 (2).

(o) *Williams v. Gesse* (1837), 3 Bing. N. C. 849. Cp. *infra*, s. 81. See also *Granger v. George* (1826), 5 B. & C. 149; *Betts v. Receiver for Metropolitan Police District*, [1932] 2 K. B. 595.

the possession (p). Examples of this form of conversion have been already considered by us. Thus, a bailee commits a conversion who sells or pledges the goods to a third person. So with a finder of goods who similarly makes away with them. So an auctioneer who sells and delivers stolen property or property subject to a bill of sale is liable to the true owner or to the bill-of-sale holder, even though ignorant of any such adverse title, and even though he has already paid over the proceeds to his own client (q). So, again, a custodian who parts with the goods after his mandate to part with them has ceased to exist is guilty of a conversion (r) (s).

9. *Conversion by wrongful disposition.*—Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by giving some other person a lawful title to them. There are certain cases in which a person in possession of goods to which he has no title can nevertheless efficiently, though wrongfully, so dispose of them by sale, pledge, or otherwise that he confers a good title to them on some one else. Any such disposition amounts to a conversion as against the true and original owner, for by the creation of this adverse title he has been deprived of his property. This is the case, for example, with a sale in market overt, and with a wrongful disposition made by a vendor or purchaser of goods who retains or obtains possession of them (t). In most of such cases, indeed, the wrongful disposition is also a wrongful delivery, and therefore is a conversion for that reason also, but this coincidence is not essential.

#### 10. A mere sale or other attempted disposition unaccompanied

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(p) It is no conversion to give the custody of the goods to your own servant, for they still remain at law in your possession.

(q) *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; *Barker v. Furlong*, [1891] 2 Ch. 172; *Cochrane v. Rymill* (1879), 40 L. T. (N.S.) 744.

(r) *Jebara v. Ottoman Bank*, [1927] 2 K. B. 254 (reversed on other grounds, *sub tit.* *Ottoman Bank v. Jebara*, [1928] A. C. 269). Cp. also *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Stephens v. Elwall* (1815), 4 M. & S. 259.

(s) It is to be remembered, however, that when a carrier, warehouseman, or other bailee dealing with goods under a contract with their owner delivers them by mistake to the wrong person, his liability for this mistake depends not only upon the law of torts and of conversion, but also upon that of contract. Whether he is bound to deliver, at his peril, to the right person or is bound only to exercise due care in making a delivery depends upon the express or implied terms of the contract. Ordinarily the duty of a carrier is merely to use reasonable care to deliver to the right person in accordance with the usual course of business. *Heugh v. London & N. W. Ry.* (1870), L. R. 5 Ex. 51. Cp. *Ashby v. Tolhurst*, [1937] 2 K. B. 242; *vide supra*, s. 72 (2).

(t) Sale of Goods Act, 1893, ss. 22, 25.

by delivery and ineffectual to divest the plaintiff's title to the property is not a conversion (u).

11. *Conversion by wrongful destruction.*—Every person is guilty of a conversion who, without lawful justification, wilfully consumes or otherwise destroys a chattel belonging to another person (x). Mere damage, however, which falls short of actual destruction, is not in itself a conversion (y). The test of destruction, as opposed to mere damage, is presumably the disappearance of the identity of the article. Grapes are presumably destroyed when they are turned into wine, cotton when it is woven into cloth, corn when it is ground into flour.

12. *Conversion of cheques.*—The conversion of cheques is a topic of importance and some difficulty. "Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor." As no specific coins in a bank are the property of any specific customer, a bank which pays part of what it owes to its customer to some other person not authorised to receive it is not at first sight converting its customer's chattels (z). Again, a bank which collects a cheque borrows from its customers the proceeds when collected, and in collecting exhausts the operation of the cheque (a). "The difficulty has been surmounted by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it" (z). "It may be that the claim in trover of the cheque is a somewhat artificial and cumbrous way of arriving at the remedy, but it is well established by a long series of authorities (b). The law regards the substance of the transaction and gives an adequate remedy for the wrong" (c).

(u) *Lancashire Waggon Co. v. Fitzhugh* (1861), 6 H. & N. 502; *Barker v. Furlong*, [1891] 2 Ch. at p. 181; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. at p. 498.

(x) (1638), Clayt. 57; Com. Dig., Action upon the case, Trover, E.; *Hollins v. Fowler* (1875), L. R. 7 H. L. p. 768.

(y) Where the chattel continues to exist as such, there may be trespass, but there is no conversion: *Simmons v. Lillystone* (1853), 8 Ex. 481.

(z) *Per Scrutton, L.J.*, in *Lloyds Bank v. Chartered Bank, etc.*, [1929] 1 K. B. 40, at pp. 55-6. Cp. American Restatement, s. 242.

(a) *Per Scrutton, L.J.*, in *Underwood v. Bank of Liverpool*, [1924] 1 K. B. p. 791.

(b) See now also *Slingsby v. District Bank*, [1932] 1 K. B. p. 558; *Midland Bank v. Reckitt*, [1933] A. C. p. 14.

(c) *Per Lord Reading, C.J.*, in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. pp. 365-8; cp. *Phillimore, L.J., S.C.*, at pp. 378-9.

18. *Miscellaneous forms of conversion.*—Every person is guilty of a conversion who, in any other way than those mentioned in the preceding sections, causes the loss of a chattel by any act of wilful interference without lawful justification. This is a residuary class of conversions which includes all modes of wrongful interference and loss except taking, detention, delivery, disposition, and destruction. So he who without lawful justification lets loose another's dog from his chain, or opens the cage in which another keeps a bird, or frightens another's cattle so that they escape from the place in which they are kept, is liable for any loss of the property which so results. So there may be a conversion even though the defendant has never been in physical possession of the goods, if he has dealt with them in such a way as to amount to an absolute denial and repudiation of the plaintiff's right (*d*). In *Van Oppen v. Tredegars* (*e*) the plaintiffs, carriers, delivered some lamp-holders by mistake to a firm. Whilst the goods were in the possession of the firm, the defendant saw them, claimed that they were his and purported to sell them to the firm, who on their part paid for them and used them in their business. It was held that the defendant had converted the lamp-holders (*f*). But it is submitted that even an absolute denial and repudiation of the plaintiff's right, if unaccompanied by circumstances which make such denial a "dealing" with the goods, does not constitute conversion (*g*).

### § 74. Acts not amounting to Conversion

1. *Mere receipt of chattel not a conversion.*—We have already seen that the mere possession of goods without title is neither a conversion nor any other kind of tort (*h*). The only detention that is actionable is adverse detention—a withholding of possession from the person entitled to it. It seems to follow logically from this, that merely to receive goods in good faith by the way of pledge, sale, or otherwise from a person who has no title to them is not a conversion by the recipient, and that the receiver commits no con-

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(*d*) So binding together sheets containing matter infringing copyright with innocent sheets so as to form a volume is a conversion of the copyright sheets: *Gaxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. 178.

(*e*) (1921), 37 T. L. R. 504; cp. *Wansbrough v. Maton* (1836), 4 A. & E. 884.

(*f*) Sir John Salmond cited *Lilley v. Doubleday* (1881), 7 Q. B. D. 510, as a further example. But in that case the liability was based on contract, see *The Südmark* (No. 2), [1918] A. C. pp. 483-4, and the Judges refused to express an opinion as to whether there was a conversion.

(*g*) *England v. Cowley* (1873), L. R. 8 Ex. 126. *Oakley v. Lyster*, [1931] 1 K. B. 148, properly considered, does not appear to be to the contrary. See Professor Goodhart's valuable discussion of that case in 47 L. Q. R. p. 168, and Iyer, p. 159.

(*h*) *Supra*, s. 73 (*g*).

version until he refuses to deliver them to the true owner, or until he wrongfully disposes of them. And this has been held to be the law in the case of a person taking goods by way of deposit. Thus, in *Spackman v. Foster* (i), certain deeds belonging to the plaintiff were fraudulently taken from him and pledged in the year 1859 with the defendant, who received them in good faith and in ignorance of the plaintiff's title. In the year 1882 the plaintiff discovered the loss of the deeds and demanded them from the defendant, who refused to give them up and pleaded the Statute of Limitations. It was held that no cause of action accrued until the demand and refusal, and that therefore the defendant was liable in trover although he had been in possession of the deeds for twenty-three years. "The defendant", said Grove, J. (k), "when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositor or bailee, bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner: and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion." A similar decision was come to on very similar facts in *Miller v. Dell* (l).

But where there is a taking by sale or in any other way than by pledge the rule is different. In *Fine Art Society v. Union Bank of London* (m) the plaintiffs banked with the defendants. The plaintiffs' secretary also banked with the defendants, and he paid into his own account certain post office orders belonging to the plaintiffs which it was his duty to pay into the plaintiffs' account. Fry and Bowen, L.JJ., held that when the secretary handed a post office order across the counter of the bank with a direction to the defendants to take it and to receive the money for it and to carry that money to the credit of his account, and when the bank clerk so took the post office order, the bank converted it (n).

(i) (1883), 11 Q. B. D. 99.

(k) (1883), 11 Q. B. D. p. 100.

(l) [1891] 1 Q. B. 468.

(m) (1886), 17 Q. B. D. 705. Cp. *Auchteroni & Co. v. Midland Bank*, [1928] 2 K. B. p. 800.

(n) Salmond considered this decision, and a rather wide dictum of Lord Ellenborough in *McCombie v. Davis* (1805), 6 East, p. 540, inconsistent with *Spackman v. Foster* and incorrect. But there is no judicial authority for extending the principle of *Spackman v. Foster* to a taking by sale or in any other way than by pledge. And Lord Ellenborough's dictum has been cited with approval by Lord Reading, C.J., in *Morison v. London County and Westminster Bank*, [1914] 3 K. B. p. 864, and by Sankey, L.J., in *Reckitt v. Barnett*, [1928] 2 K. B. p. 263, and *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. p. 69. See Cl. & L. (9th ed.),

2. *No conversion if chattel merely restored to person from whom it was received.*—It further follows that if he who innocently acquires possession of another's goods by way of deposit redelivers them to him from whom he got them, before he has received notice of the plaintiff's claim to them, he is free from responsibility. He has not deprived the plaintiff of his property, for that property is now in exactly the same position as if the defendant had never interfered with it at all. Accordingly in *Union Credit Bank v. Mersey Docks and Harbour Board* (o) certain hogsheads of tobacco belonging to the plaintiffs were fraudulently pledged by a third person with the defendants by the delivery of the dock warrants. The defendants acted throughout in good faith, and subsequently returned the warrants to the pledgor on redemption. The plaintiffs thereafter demanded the property from the defendants and sued in trover, when it was held by Bigham, J., that they were not liable. "A warehouseman", said Blackburn, J., in *Hollins v. Fowler* (p), "with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have no authority from the true owner" (q).

3. *Delivery by innocent holder to third person.*—What shall be said, however, if the innocent holder has delivered the goods not to the person from whom he received them, but at his order to some third person : as when a carrier receives stolen goods from a consignor, and delivers them to the consignee ; or a warehouseman delivers such goods to him to whom the delivery warrant has been transferred by the depositor. If in such a case the defendant acts in good faith and without any knowledge that the delivery made by him is in pursuance of some sale or other disposition purporting to affect the title and not merely the possession of the goods, it is probable that he is under no liability. Blackburn, J., in *Hollins v. Fowler* (r) said : "On principle, one who deals with goods at the request of the person who has the actual custody of them in

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p. 331. On the other hand, Winfield now regards the decision in *Spackman v. Foster* as questionable, and sees no reason for distinguishing innocent receipt of goods by way of pledge from similar receipt by way of sale: *Torts*, pp. 395-6. But in the case of a pledge, unlike that of sale, it is not necessary for the transferor to show title.

(o) [1899] 2 Q. B. 205.

(p) (1875), L. R. 7 H. L. p. 767.

(q) *Aliter* if he has notice of the claim of the true owner. He should interplead. If he does not, he delivers at his peril: *Winter v. Banks* (1901), 84 L. T. 504.

(r) (1875), L. R. 7 H. L. p. 766.



the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was the finder of goods or intrusted with their custody." On this principle a carrier who merely receives and delivers goods in the ordinary way is not liable in trover merely because the transaction was a conversion on the part of the consignor (s).

If, however, a carrier, warehouseman, agent, or bailee has actual knowledge that his delivery of the goods is part of a transaction affecting the title and not merely the possession, the question of his liability would seem to be still an unsettled point in the law of conversion. If the case of *National Mercantile Bank v. Rymill* (t) is well decided, there is no liability even under these circumstances. In this case it was held by the Court of Appeal that an auctioneer with whom the goods of the plaintiff had been wrongfully deposited for sale was not liable for a conversion, although he had delivered them at the request of the vendor to a person to whom, as the auctioneer knew, the vendor had sold them by private contract. It is difficult to reconcile this decision with earlier cases such as *Stephens v. Elwall* (u), and it is contrary to the opinion of Blackburn, J., in *Hollins v. Fowler* (w). If well decided (and the principle is adopted in the American Restatement (x)), it is an authority for this principle: that a bailee commits no conversion merely by redelivering the goods to his bailor or to the order of his bailor, even with the knowledge that the transaction is a sale or other disposition of the title, provided that he has no notice of any adverse claim on the part of the plaintiff. It is clearly otherwise, however, if the bailee has not merely delivered with knowledge of the sale, but has himself sold as well as delivered, even though he sells merely as an agent and without claiming any beneficial interest in the property for himself (y).

(s) *Greenway v. Fisher* (1824), 1 C. & P. 190; *Sheridan v. New Quay Co.* (1858), 4 C. B. (N.S.) p. 650, *per* Willes, J.; *Fowler v. Hollins* (1872), L. R. 7 Q. B. p. 632, *per* Martin, B.

(t) (1881), 44 L. T. 767.

(u) (1815), 4 M. & S. 259.

(w) (1875), L. R. 7 H. L. at p. 767.

(x) S. 233.

(y) *Barker v. Furlong*, [1891] 2 Ch. 172; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495. See the observations of Collins, J., in this case on the whole question, and *supra*, s. 72 (5), n. (w).

## § 75. Conversion by Estoppel (z)

1. A defendant who has in truth committed no conversion may be held liable for one because he is estopped by his own act from alleging the fact which constitutes his defence: for example, that he has never had possession of the goods, or that he is no longer in possession of them, or that the plaintiff has no title to them.

*Estoppel by representation.*—Thus, in *Seton v. Lafone* (a) goods were deposited by A for safe custody with the defendant, a warehouseman, whose servants subsequently delivered them by mistake to a stranger. Thereafter, in ignorance of this fact, the defendant represented to B that he was still in possession of these goods on behalf of A, whereupon B purchased them from A and demanded delivery from the defendant. It was held that the defendant was estopped from denying that he had the goods, and he was accordingly held liable as for a conversion by refusing to deliver them (b).

2. *Estoppel of a bailee.*—A bailee is estopped from denying the title of his bailor, and therefore a refusal to redeliver the property is a conversion, even though in fact the plaintiff has no title to it (c). Nor does it make any difference whether the plaintiff has no title at the time of the bailment, or has lost his title since the bailment. Thus, in *Rogers v. Lambert* (d) the plaintiffs bought certain copper from the defendants and paid for it, but it remained in the defendants' possession as warehousemen for the plaintiffs. The plaintiffs then resold the copper to a third person, who paid them for it. The plaintiffs having thereafter demanded possession, the defendants refused to deliver on the ground that the plaintiffs had no longer any title to the copper. It was held, however, by the Court of Appeal that the defendants were estopped as bailees from raising any such defence, and that they were liable in trover for the full value of the property. On the other hand, the estoppel of a bailee no longer exists, if he has already, on the demand of the true owner,

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(z) This is a convenient expression used by Salmond, though estoppel is in general only a rule of evidence and not a cause of action.

(a) (1887), 19 Q. B. D. 68.

(b) According to *Bristol and West of England Bank v. Midland Ry.*, [1891] 2 Q. B. 653, however, the defendant is equally liable in such a case even when there is no estoppel. See also *Goodman v. Boycott* (1862), 2 B. & S. 1; *Henderson v. Williams*, [1895] 1 Q. B. 521.

(c) *Biddle v. Bond* (1865), 6 B. & S. 225. But estoppel does not apply to hire-purchase: *Karflex v. Poole*, [1933] 2 K. B. 251.

(d) [1891] 1 Q. B. 318.

given up possession to him, or if he defends the action on his behalf, and by his authority (e).

### § 76. The Title of the Plaintiff (f)

1. *Action by person entitled to immediate possession.*—Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of the conversion to the immediate possession of them. The action of trover is based on possession and the right of immediate possession, and not always on the right of ownership. A person entitled to such possession can sue in trover, even though he is not the owner of the property but a mere bailee, agent, or pledgee (g). Conversely a person not so entitled cannot sue in trover, even though he is the owner of the property. We shall deal with the remedies for injuries to reversionary interests in chattels later (h).

2. *Remitter to right of immediate possession.*—But in certain cases a person who has a merely reversionary interest is remitted to the right of immediate possession by the very act of conversion itself, which causes in certain circumstances a forfeiture and determination of the particular interest in possession. Thus, if chattels are bailed for a fixed term by way of hiring, and the bailee sells them, he thereby determines the bailment; and the bailor accordingly becomes entitled to immediate possession, and can therefore sue either the bailee himself or the purchaser in trover, and not merely for an injury to his reversionary interest (i). Whether a wrongful act does or does not thus determine a bailment depends

(e) *Biddle v. Bond* (1865), 6 B. & S. 225; *Rogers v. Lambert*, [1891] 1 Q. B. p. 328; *Russian Commercial Bank v. Comptoir d'Escompte de Mulhouse*, [1928] 2 K. B. p. 673, *per* Atkin, L.J. The remedy of a bailee against whom adverse claims are made is to take interpleader proceedings: *Robinson v. Jenkins* (1890), 24 Q. B. D. 275. The estoppel of a bailee is closely analogous to the rule that a possessory title is good against all but the true owner. It is possible, indeed, that the former rule is in truth merely a particular application of the latter. *Vide infra*, s. 76.

(f) See E. H. Warren's interesting article in 49 H. L. R. 1084.

(g) *The Winkfield*, [1902] P. 42. Similarly, although an equitable title is not sufficient to found an action at common law for conversion or any other injury, yet if an equitable owner is in possession under the terms of the trust, he can sue at common law in reliance on his possessory title without joining his trustee as a plaintiff: *Healey v. Healey*, [1915] 1 K. B. 938.

(h) *Infra*, s. 87.

(i) *Nyberg v. Handelaar*, [1892] 2 Q. B. 202. But where, as under a hire-purchase agreement, the contract of bailment also confers a proprietary interest, it does not follow that because that part of the contract which is a contract of bailment is at an end the other part of the contract which confers a proprietary interest is also at an end: *Whiteley v. Hilt*, [1918] 2 K. B. 808.

on whether it is or is not a breach of some express or implied condition of the contract of bailment (*k*). In *Mulliner v. Florence* (*l*) the plaintiff's goods were in possession of the defendant, an inn-keeper, and rightly held by him under a lien for a debt incurred by a third person, who had brought them to the inn. The inn-keeper sold them illegally, and it was held that the lien was thereby destroyed, and the plaintiff remitted to his right of immediate possession, and thereby entitled to sue the inn-keeper in trover for the full value of the property without any allowance in respect of the debt (*m*). In *Donald v. Suckling* (*n*) and *Halliday v. Holgate* (*o*), on the other hand, it was held that a pledge is not determined by a premature sale or improper sub-pledge, and that the pledgor therefore cannot maintain trover or detinue until by payment or tender of the debt due by him he has entitled himself to immediate possession.

3. *Possessory title sufficient in trover.*—*Mere de facto* possession is, as against a stranger, a sufficient title to support an action for a conversion, and the defendant cannot plead the *jus tertii* unless he defends on behalf and by the authority of the true owner, or has already made satisfaction to him. "The law is", said Lord Campbell in *Jeffries v. Great Western Ry.* (*p*), "that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is a title." Thus, in *Armory v. Delamirie* (*q*) a boy who found a jewel recovered its full value in trover from a jeweller to whom he offered it for sale and who refused to return it to him. So in *Bridges v. Hawkesworth* (*r*) he who found a lost bundle of bank-notes on the floor of a shop was held entitled to sue in trover for their value the shopkeeper with whom he had deposited them for the purpose of discovering the owner (*s*) (*t*).

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(*k*) *Donald v. Suckling* (1866), L. R. 1 Q. B. p. 614, *per* Blackburn, J.

(*l*) (1878), 3 Q. B. D. 484.

(*m*) This was before the existence of the present statutory power of sale.

(*n*) (1866), L. R. 1 Q. B. 585.

(*o*) (1868), L. R. 3 Ex. 299.

(*p*) (1856), 5 E. & B. p. 805.

(*q*) (1721), 1 Str. 505.

(*r*) (1851), 21 L. J. Q. B. 75.

(*s*) See also *Sutton v. Buck* (1810), 2 Taunt. 302; *The Winkfield*, [1902] P. 42; *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405.

(*t*) *Title to goods found.* It is to be observed that the best title to goods found is not necessarily in him who finds them. In certain cases he is bound to give them up to some third person. See *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562;

4. Presumably it makes no difference in what mode the plaintiff obtained the possession on which he relies. Whether honest or dishonest, it is a good title *adversus extraneos* (u).

5. A possessory title once acquired continues, although the possessory owner has delivered possession to a bailee, agent, or other person who holds the property on his behalf returnable at will. Thus, if A finds goods, and deposits them with B, A has a right of action not merely against B, but also against any other person who converts the property (w).

6. *Duration of possessory title.*—A possessory title once acquired probably continues to exist notwithstanding a loss of the possession by the wrongful act of a stranger. Thus, if A finds goods, and they are taken from him by B and sold by B to C, it is probable that A has an action of trover not only against B, but also against C. At the time of C's conversion it is true, indeed, that A had no longer any subsisting possession, but he still retained the possessory title which he acquired through his former possession (x).

7. *Destruction of possessory title.*—When a possessory title thus subsists notwithstanding the absence of actual possession, it is probably destroyed by any act or event which would have destroyed it had it been a good legal title: as for example, a sale of the property by the possessory owner, or his bankruptcy. Thus, in *Richards v. Jenkins* (y), A, the owner of chattels, let them to B at a rent, and became bankrupt. He concealed his ownership of the property from his trustee in bankruptcy, and continued to receive rent from B, who was ignorant of the bankruptcy. An execution creditor of B subsequently seized the goods, and A claimed them, the trustee in his bankruptcy not intervening. It was held that the execution creditor was entitled to the goods as against A. The claimant had at that time no property in the goods. This was a case, therefore, in which the *jus tertii* was successfully set up against the claim of a person from whose bailee the defendant had taken the property. The defendant was permitted to say to the bailor:

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*South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44. The law upon the subject is far from clear. Sir John Salmond's views may be found in his *Jurisprudence* (8th ed.), pp. 304-7, but these views have been subjected to a trenchant criticism by Goodhart, *Essays*, ch. 4. See also Riesman, "Possession and the Law of Finders", in 52 H. L. R. 1105, and Winfield, pp. 392-5.

(u) *Buckley v. Gross* (1863), 3 B. & S. p. 574.

(w) *Bourne v. Fosbrooke* (1865), 18 C. B. (N.S.) 515; *Barker v. Furlong*, [1891] 2 Ch. 172.

(x) *Buckley v. Gross* (1863), 32 L. J. Q. B. p. 181, *per* Blackburn, J. See also *ibid.* p. 181, *per* Crompton, J.

(y) (1887), 18 Q. B. D. 451.

"Your title has determined since the bailment was made; you are no longer in possession; and any title (possessory or legal) which you formerly had has been divested by your bankruptcy" (z).

8. A possessory title is divested by any rightful dispossession effected by or on behalf of the true owner: for example, the retaking of the property, or the attornment of the possessory owner's bailee to the true owner (a).

9. *When the jus tertii may be pleaded.*—If the plaintiff was in actual possession, and even if the defendant got possession of the goods by a trespass against the plaintiff, the defendant can plead the *jus tertii* in three cases (but in no others):—

- (a) When he defends the action on behalf and by the authority of the true owner (b);
- (b) When he committed the act complained of by the authority of the true owner;
- (c) When he has already made satisfaction to the true owner by returning the property to him (c).

If, however, the plaintiff was not in actual possession but relies upon his right to possession, he must recover on the strength of his title, and proof of the *jus tertii* will destroy the only thing upon which he relies (d).

10. *Effect of satisfaction made to possessory owner.*—Payment of the value of the property to a merely possessory owner, even in pursuance of a judgment and by compulsion of law, is no defence to a subsequent action by the true owner (e). But it is to be presumed that if by reason of this rule a defendant has been compelled to pay twice for a conversion committed by him, he will have a

(z) The estoppel of a bailee, on the contrary, survives such determination of the bailor's interest, and in this respect at least the rule as to title by estoppel seems to be wider than the rule as to title by possession: *Rogers v. Lambert*, [1891] 1 Q. B. 318. On the whole matter, however, the law is uncertain and undeveloped.

(a) *Buckley v. Gross* (1863), 3 B. & S. 566. This case depends on the authority of the police to take possession of and deal with property suspected to have been stolen.

(b) *Biddle v. Bond* (1865), 6 B. & S. 225. Cp. *The Jupiter*, [1927] P. pp. 137, 254.

(c) If he has already paid the vendor the value of the property, the defendant will also succeed, but in such a case he will be setting up not a *jus tertii*, but as assignee of the *tertius* a *jus sui*: *Eastern Construction Co. v. National Trust Co.*, [1914] A. C. 197, p. 210.

(d) *Leake v. Loveday* (1842), 4 M. & G. 972. See Holdsworth, H. E. L., vii, 424-31, for a very clear statement upon this difficult topic.

(e) *Attenborough v. London and St. Katharine's Dock Co.* (1878), 3 C. P. D. p. 454, *per* Bramwell, B.

right of action in *indebitatus assumpsit* against the possessory owner for repayment of the amount so received by him.

As we have already seen, if the defendant, instead of paying damages at the suit of a possessory owner, restores the chattel to him without notice of any adverse claim this is no conversion, and he incurs no liability to the true owner (*f*). Moreover, a defendant sued by a possessory owner may protect himself against an adverse claim by taking interpleader proceedings (*g*).

### § 77. Conversion as between Co-owners

When a chattel is held in common ownership, one of the owners cannot sue another of them in trover unless the act of the defendant amounts to the destruction of the chattel or otherwise permanently destroys the right of the plaintiff to the possession thereof—*e.g.*, by a sale in market overt (*h*). Each of the co-owners is equally entitled to the possession and use of the chattel, and neither therefore commits any wrong as against the other by taking or retaining possession of it and using it for the purposes for which it is designed, even if the other is thereby prevented from making the like use of it. If any owner in the exercise of this right acquires from the use of the common property a greater share of the profits derived therefrom than that to which he is entitled, he does not thereby commit any actionable tort against the other owner but the proper remedy is an action of account (*i*).

### § 78. Conversion and the Limitation of Actions

*Successive conversions.*—It often happens that two or more successive acts of conversion are committed in respect of the same property, either by the same person or by different persons, and difficult questions arose as to the date from which in such cases the period of limitation under the Statute of Limitations, 1623, began to run (*k*). Section 3 of the Limitation Act, 1939, deals with both cases. Previous to that Act the only effect of the expiry of the period of limitation was to bar the plaintiff's right of action. Now under the Act of 1939 not only his right of action but his title

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(*f*) *Supra*, s. 74 (2).

(*g*) *Supra*, s. 75 (2), n. (*e*).

(*h*) *Fennings v. Lord Grenville* (1808), 1 Taunt. p. 249.

(*i*) See *Jacobs v. Seward* (1872), L. R. 5 H. L. 464; *Nyberg v. Handelaar*, [1892] 2 Q. B. 202; *Farrar v. Beswick* (1836), 1 M. & W. 682; see also Lindley on Partnership, pp. 38–40 (9th ed.). Cp. the law as to trespass between tenants in common of land, *supra*, s. 48 (5).

(*k*) See 9th ed., s. 84.

to the chattel converted is extinguished as it had previously been, and still is, in the case of land under the Real Property Limitation Act, 1833 (*m*). The Act of 1939 further provides: "Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention". So where there are successive acts of conversion by the same person, as where, for example, the defendant wrongfully takes a chattel, and on a subsequent date wrongfully consumes it, or refuses to restore it on demand, or (2) where there are successive conversions by different persons, as where, for example, A wrongfully disposes of the plaintiff's chattel to B who subsequently refuses to deliver it up on demand, the cause of action is extinguished after six years from the original conversion (*n*). The result is that the defendant who originally acquired possession unlawfully is in a better position than the defendant whose original possession was lawful. For if the defendant was lawfully in possession the time runs from the demand and refusal, no matter how long the goods have been in his possession. This has been called a "peculiarly immoral doctrine" (*o*), but the rule must be read in the light of the general exception of concealed fraud (*p*). If the prior act of conversion is a fraudulent one, the period of limitation runs not from the date of that conversion, but from the date of its subsequent discovery by the plaintiff.

### § 79. The Measure of Damages for Conversion

1. *Bailees can recover the whole value of the property.*—If a plaintiff relies upon a right of possession he can recover only according to the amount of his interest (*q*); but any person who has

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(*m*) S. 34. This resolves the difficulties discussed in 9th ed., s. 84 (4). Since July 1, 1940, English law has for the first time had a doctrine of usucapion of chattels.

(*n*) As to (1) the Limitation Act, 1939, overrules *Miller v. Dell*, [1891] 1 Q. B. 468, though Sutton (Underhill, p. 391) thinks that case may still on the facts be good law as title deeds may not be chattels; as to (2) it overrules *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206, unless that case was correctly explained by Salmond (6th ed., s. 108 (2)) as a case of concealed fraud. But Sutton, *ubi supra*, p. 393, treats that case as still law.

(*o*) Jenks in 49 L. Q. R. pp. 224-5.

(*p*) *Supra*, s. 37 (6).

(*q*) *Bloxam v. Hubbard* (1804), 5 East 407: see Cl. & L. p. 354.



actual possession of a chattel is entitled, in an action for the conversion of it, to recover its full value as damages, even although he is not the owner of it, but has merely a limited interest in it. Thus, a bailee, agent, or pledgee is entitled not merely to sue for a conversion, but to recover in such an action not only the value of his own limited interest, but the whole value of the chattel. For the plaintiff is entitled, as against the defendant, to the possession of the chattel itself. Damages are merely a substitute for such possession, and the damages must therefore be the equivalent of the chattel, and amount to the full value of it. In other words, the plaintiff in trover is entitled either to the property or to its pecuniary equivalent.

2. The leading case on the subject is *The Winkfield* (r), in which the Postmaster-General was held entitled as bailee to recover the whole value of certain mails which were lost through a collision at sea caused by the negligence of the defendants. The same principle applies in actions for conversion (rr).

3. *Surplus damages held by bailee for owner.*—The damages so recovered by the plaintiff above the value of his own interest are recovered and held by him on account of the other persons interested in the property, and he is liable to those others in an action for money had and received to their use. In other words, he holds the money which now represents the goods on the same trusts and terms as those on which he held the goods themselves. “As the bailee has to account for the thing bailed, so he must account for that which has become its equivalent, and now represents it. What he has received above his own interest he has received to the use of his bailor” (s).

4. *Limits of the rule in The Winkfield.*—Inasmuch as by the rule in *The Winkfield* a plaintiff with a limited interest recovers and holds the surplus damages on behalf of the other persons interested in the property, it follows that if the defendant himself is one of those persons the plaintiff's claim must be reduced by the amount of the defendant's interest; otherwise we should have the absurdity of A recovering from B damages which he would have to hold on

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(r) [1902] P. 42. See also *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405; *Eastern Construction Co. v. National Trust Co.*, [1914] A. C. 197, p. 210; *Armory v. Delamirie* (1721), 1 Str. 504; *Swire v. Leach* (1865), 18 C. B. (n.s.) 479. *Claridge v. South Staffordshire Tramways Co.*, [1892] 1 Q. B. 422, is no longer law.

(rr) *Swire v. Leach* (1865), 18 C. B. (n.s.) 479.

(s) *The Winkfield*, [1902] P. p. 60.

B's account. So also with any interest vested in some third person to whom the defendant is for any reason not responsible; otherwise A would recover from B on behalf of C damages to which C has no claim. Therefore, if the grantor of a bill of sale wrongfully sells the chattels in fraud of the grantee, the latter cannot recover either from the grantor himself, or from the purchaser of the property, or from the auctioneer through whom the sale was effected, the whole value of the property if it exceeds the amount of the debt, but only the value of his own interest therein—*viz.*, the amount of the debt (t).

5. *Effect of satisfaction made to owner.*—It has never been decided, but it is presumably the law, that a plaintiff entitled under the rule in *The Winkfield* to recover the whole value of the property on account of himself and all other persons interested can do so only if these others stand by and make no objection. A bailee, for example, cannot against the will of his bailor, or an agent against the will of his principal, recover the full value of the property on his behalf. Therefore if the bailor or principal has already received, with or without an action, the value of his interest from the defendant, it is impossible for the bailee to recover more than his own interest. It seems also to follow that, even though no such prior satisfaction has been made, it is a good defence to a claim for full value made by a plaintiff with a limited interest, that a claim has been already made on the defendant by another person interested in the property, and that the action is defended on that person's behalf and by his authority. It is settled that this is a good plea in an action brought by a plaintiff with a merely possessory interest (u), and there seems no reason why it should be less effective in a claim by a plaintiff with a limited interest for damages in excess of that interest.

6. *Effect of satisfaction made to the bailee.*—When a defendant has, in accordance with the rule in *The Winkfield*, paid the full value of the property to a claimant with a limited interest, he is probably thereby discharged from all liability to any other person interested in the property. "The wrongdoer", says Collins, M.R., in *The Winkfield* (w), "having once paid full damages to the bailee, has an

(t) See *Brierly v. Kendall* (1852), 17 Q. B. 937; *Chinery v. Viall* (1860), 5 H. & N. 288; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K. B. 244; *Whiteley v. Hilt*, [1918] 2 K. B. 808; cp. *Underwood v. Bank of Liverpool*, [1924] 1 K. B. p. 794.

(u) *Biddle v. Bond* (1865), 6 B. & S. 225.

(w) [1902] P. p. 61. See criticism of this rule by Warren in 49 H. L. R. pp. 1095—1100.

answer to any action by the bailor." So Parke, B., in *Nicolls v. Bastard* (x), speaking of bailor and bailee, said, "Whichever first obtains damages, it is a full satisfaction". This rule was first put forward in 1874 by Cavendish, C.J. (y), and has never since been disputed, but the matter has been very little considered, and involves serious difficulties. The rule is clearly otherwise in the case of payment to a wrongdoer having a merely possessory title; payment to him, even by compulsion of the law, is no defence against a subsequent claim by the true owner (z). What, then, shall be said of payment to a finder, or to a bailee who has already refused to deliver to his bailor? Moreover, since he who *buys* property from a mere bailee, and pays him for it, has no defence against the bailor in an action for the value, why should he be in a better position if he *converts* the property and then pays for it? When a bailee recovers the full value of the chattel, he holds it on account of the bailor; why should the risk of the loss of this money by the bailee's misappropriation or bankruptcy lie upon the innocent bailor rather than upon the wrongdoer who converted the property?

7. *Bailor already indemnified by bailee.*—Conversely, it seems that if a bailor has already been indemnified by the bailee he can none the less recover the full value of the goods in conversion. He would have to account for the sum so recovered to the bailee who had already paid him, but the measure of damages in an action against the wrongdoer would not be affected (a).

8. *Damages recoverable by possessory owner.*—Any plaintiff who has a possessory title to property is entitled to recover the same damages for a conversion of it as if his possessory title amounted to legal ownership. When a plaintiff has and relies on a possessory title, the *jus tertii* is no more available as a ground for the reduction of damages than as a defence to the action. As against a wrongdoer a possessory title is to be taken as being a legal one, and it has the same effects (b).

(x) (1835), 2 C. M. & R. p. 660. See also *Eastern Construction Co. v. National Trust Co.*, [1914] A. C. 197, p. 210.

(y) Y. B. 48 Edw. III, Mich. pl. 8; see Holdsworth, H. E. L., vii, pp. 461-2.

(z) *Attenborough v. London & St. Katharine's Dock Co.* (1878), 3 C. P. D. p. 454, per Bramwell, B.

(a) Per Atkin, J., "as at present advised", in *Lancashire and Yorkshire Ry. v. MacNicoll* (1919), 88 L. J. K. B. p. 607.

(b) *Armory v. Delamirie* (1721), 1 Str. 505; *Bridges v. Hawkesworth* (1851). 21 L. J. Q. B. 75; *The Winkfield*, [1902] P. 42.

9. *Value recovered as at date of conversion.*—The value recoverable in an action for conversion is in general the value of the property at the date of the conversion, and not its value at any earlier or later date (c). If the property falls in value after the date of the conversion, even without any act or default of the defendant, he is nevertheless liable to account for its original value: as in the case of shares in a limited company (d). For *non constat* that the plaintiff would not, before such a loss occurred, have sold the property and so obtained the value of it at the time of the sale.

10. *Effect of increase in value.*—If, on the other hand, the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has no title to it, and his claim is limited to the original value of the chattel. Thus, in *Reid v. Fairbanks* (e) the defendant wrongfully took possession of a half-finished ship belonging to the plaintiff, and then completed the building of it; and it was held that the plaintiff could recover only the value of the unfinished article.

If, however, the subsequent increase of value is not due to the act of the defendant, but would have occurred in any case, even had no conversion been committed, the plaintiff is entitled to recover it as special damage resulting from the conversion, in addition to the original value of the property converted: as when goods taken or detained have risen in value by reason of the fluctuation of the market (f) (g).

11. *Special damages in addition to value of property.*—In all actions for a conversion the plaintiff may recover, in addition to the value of the property or of his interest in it, any additional damage which he may have sustained by reason of the conversion which is not too remote (h).

12. *Reduction of damages by return of chattel.*—Damages in

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(c) As to the method of determining the value see *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. pp. 192-3, 203; *Hall, Ltd. v. Barclay*, [1937] 3 A. E. R. 620.

(d) *Solloway v. McLaughlin*, [1938] A. C. 247.

(e) (1853), 13 C. B. 692.

(f) *Greening v. Wilkinson* (1825), 1 C. & P. 625. Winfield, p. 406, doubts this. Lord Porter reserved his opinion on the point in *Caxton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 203.

(g) As to the measure of damages for a conversion, when the chattels converted have been severed from land, as in the case of minerals, crops, or fixtures, see above, s. 50 (4).

(h) *Bodley v. Reynolds* (1846). 8 Q. B. 779; *France v. Gaudet* (1871), L. R. 6 Q. B. 199. Cp. *The Arpad*, [1934] P. 189, at pp. 232-6.

conversion may be reduced by the return of the chattel converted (i), and where there has been a series of conversions of the same chattel, the return of the chattel by one of the wrongdoers may be used to reduce the damage against each wrongdoer. Further, where the defendant is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted he is *pro tanto* excused (k). But mere receipt of moneys from the wrongdoer will not go in diminution of damages unless the plaintiff has received the benefit of the sum in question and has received it with knowledge of the conversion (l).

13. Where there is a doubt about the value of a chattel which has been converted the defendant must either produce it or account for its non-production. If he does not do so, it will be assumed against him that it was of the highest possible value. *Omnia praesumuntur contra spoliatorem* (m).

14. The foregoing rules as to the measure of damages for a conversion apply, *mutatis mutandis*, to actions for any wrongful destruction, or damage of chattels not amounting to conversion (n).

### § 80. Effect of Judgment in an Action of Trover

1. *Judgment in trover without satisfaction does not affect title to the property.*—A mere judgment in trover for the value of the property (o) without actual satisfaction does not in any way affect the plaintiff's title to the property. It does not amount to an election to take the pecuniary value of the goods in lieu of the goods themselves. Therefore he may exercise all his rights as owner notwithstanding the judgment. He may seize the chattel either from the defendant or from any one else in whose hands it is. He may sue a third person for its specific restitution. He may even sue for damages, and get a second judgment for the value of the property against a third person in respect of any other conversion committed either before or after the conversion on which the first action was brought. Yet in no case can he by the exercise of such concurrent

(i) *Sollomay v. McLaughlin*, [1938] A. C. 247.

(k) *Hiort v. L. & N. W. Ry.* (1879), 4 Ex. D. 188; *Bannatyne v. MacIver*, [1906] 1 K. B. 103. Cp. *Liggett (Liverpool) v. Barclays Bank*, [1928] 1 K. B. 48.

(l) *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. 40.

(m) *Armory v. Delamirie* (1721), 1 Stra. 505.

(n) *The Winkfield*, [1902] P. 42.

(o) The judgment may be either for the value alone or for the value with an alternative provision for the return of the property. The rule is the same in both cases: *Ellis v. Stenning*, [1932] 2 Ch. 81.

remedies obtain a double satisfaction. If he actually recovers the property, his judgment for its value becomes inoperative; and if he actually receives its value, he cannot exercise his right of recaption or enforce his judgment for specific restitution. And if he receives its value from one defendant, he cannot enforce his judgment against another (p).

2. *Judgment followed by satisfaction transfers property.*—Although judgment without satisfaction has thus no effect upon the property or upon the rights of the owner of it, judgment for the value of the goods followed by full satisfaction divests the plaintiff's ownership and vests it in the defendant. It amounts to an election on the part of the plaintiff to accept money in lieu of the goods. It is in effect a compulsory purchase of the goods by the defendant. The same result must follow from payment of the full value even without action or judgment, if made to a person entitled to receive it. After such satisfaction, therefore, the former owner is deprived of all his rights of recaption and specific restitution. Nor can he sue for damages in respect of any conversion subsequent to satisfaction made. As to any prior conversion, on the other hand, he presumably retains a right to sue for any actual damage sustained by him in consequence of it over and above the value of the goods (q).

3. Property so divested from the plaintiff by satisfaction made does not necessarily vest in the defendant. It may vest instead in some person who claims under him, and therefore has a better title to the property than he has; for example, when A takes property from B, and sells it to C, satisfaction made by A to B will vest the property in C.

4. *Limits of operation of satisfaction.*—Satisfaction made to a plaintiff in trover does not operate to transfer the ownership of the property save as against the plaintiff himself, and as against any other persons whose right of action for damages is barred by the action of the plaintiff. Thus, payment made to a mere possessory owner will not divest the title of the true owner; and whether payment made to a bailee will divest the title of his bailor depends on

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(p) This passage was cited with approval by Luxmoore, J., in *Ellis v. Stenning*, [1932] 2 Ch. 81, p. 90. See, on the whole matter, *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584; *Ex p. Drake* (1877), 5 Ch. D. 866; *Morris v. Robinson* (1824), 3 B. & C. 196; *Ellis v. Stenning*, *ubi supra*; *Cazton Publishing Co. v. Sutherland Publishing Co.*, [1939] A. C. p. 198.

(q) *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584.

whether an action brought by a bailee is a bar to a subsequent action by the bailor (r).

### § 81. Detinue

1. *Wrongful loss of chattels not amounting to conversion.*—We have already seen that although the act of wrongfully causing a loss of the possession of chattels amounts in most cases to the wrong of conversion, this is not invariably so. It depends on whether the loss is the result of any wilful and wrongful interference with the chattels. If the loss is the result of any such wrongful interference, it is a conversion. The action under the old law would have been an action of *detinue sur trover*, an action delictual in its origin. The action now may be one for conversion by detention. But if the loss does not result from any such wrongful interference, the loss is no conversion. The action under the old law would have been an action of *detinue sur bailment*, an action contractual in its origin. The action now can only be an action of detinue, not trover for conversion (s). Thus, if a carrier or warehouseman delivers goods by mistake to the wrong person, he is liable in certain circumstances for a conversion, but not if he loses them by negligence (t). He could not in this latter case have been sued under the old practice in trover, but only in detinue or *assumpsit*.

2. *Modern use of detinue.*—Detinue at the present day has two main uses. In the first place, the plaintiff may desire the specific restitution of his chattels and not damages for their conversion (u). He will then sue in detinue, not in trover. In the second place, he will have to sue in detinue if the defendant sets up no claim of ownership and has not been guilty of trespass; for the original acquisition in *detinue sur bailment* was lawful. Detinue lies against him who once had but has improperly parted with possession (w). It is a good defence that possession has been lost without default of the defendant, but in order to succeed the defendant must prove this affirmatively (x).

3. *Detention must be adverse.*—In an action of detinue as in an

(r) As to this, see s. 79 (6), above.

(s) *Supra*, ss. 71 (4), 71 (6), 72 (2): Holdsworth, H. E. L., vii, 418-4, 438-40. But see Cl. & L. pp. 332-4.

(t) Cp. *The Arpad*, [1934] P. at p. 232, *per* Maughan, L.J.

(u) *Infra*, s. 82. Cp. Halsbury, xxxiii, p. 50.

(w) *Jones v. Dovele* (1841), 9 M. & W. 19.

(x) *Smith v. Great Western Ry.*, [1921] 2 K. B. p. 256, *per* Atkin, L.J. Cp. *Ransom v. Platt*, [1911] 2 K. B. 291; *Coldman v. Hill*, [1919] 1 K. B. 443; *Morison, Pollexfen and Blair v. Walton* (1909), in House of Lords, cited in *Joseph Travers & Sons, Ltd. v. Cooper*, [1915] 1 K. B. 73.

action of conversion by detention (y) the defendant must have shown an intention to keep the thing in defiance of the plaintiff. Neither the mere having the goods in the defendant's possession nor the mere omission to deliver, in the sense of taking the goods to the plaintiff, is sufficient to found an action of detinue. "*Detinet* means more than *tenet*." In order to support the action there must be a withholding the goods and preventing the plaintiff from obtaining possession of them. The detention must be adverse (z).

4. *Jus tertii*.—Under the old law the question of the *jus tertii* did not arise in *detinue sur bailment*: if the bailment were proved, and the bailee was still in possession, he could not dispute his bailor's title; while if he were not in possession he was absolutely liable to his bailor (a). The modern law is that the bailee can only plead the *jus tertii* (i) if he has been evicted by title paramount, that is to say has had the subject forcibly taken from him by the true owner (b), and (ii) if he defends the action brought by the bailor under the title and by the authority of the owner (c). He may be barred even in these cases from pleading the *jus tertii* by the terms of the contract (d) or if he has received the bailment with full notice of the defect in the bailor's title (e). In other cases, he cannot be heard to say that the bailor had no title either at the commencement of the bailment or at any subsequent date (f).

## § 82. Specific Restitution of Chattels

1. *Specific restitution in lieu of damages*.—At common law the normal remedy for the recovery of chattels was the action of detinue. In that action the judgment was in the alternative—that the plaintiff do recover the possession of the chattels, or their assessed value in case possession cannot be had, together in any case with damages for their detention. At common law this alternative judgment in detinue was enforced by a writ of *distringas*, in pursuance of which

(y) *Supra*, s. 73 (3).

(z) *Clements v. Flight* (1846), 16 M. & W. 42. Cp. under the Metropolitan Police Courts Act, 1839, s. 40, *Scottish Dyers v. Manheimer* (1942), 166 L. T. 358 (goods stolen from bailees who were not negligent).

(a) Holdsworth, H. E. L., iii, 343-4, vii, 425. Some doubt, however, is thrown upon the absolute liability of the bailee in early law by the publication in 1925 of a case of 1315, *Bowdon v. Pelletier*, Selden Society, vol. xli, p. 136.

(b) *Shelbury v. Scotsford* (1603), Yelv. 22.

(c) *Rogers v. Lambert*, [1891] 1 Q. B. 318; Cl. & L., p. 349.

(d) *Koss v. Edwards* (1895), 11 Rep. 574.

(e) *Ex p. Davies* (1882), 19 Ch. D. p. 90, *per* Jessel, M.R.

(f) *Rogers v. Lambert*, [1891] 1 Q. B. 318.



the defendant was distrained by all his lands and chattels until he obeyed the judgment. But it was in his, not the plaintiff's, election whether he would deliver the chattels or pay the assessed value of them. The owner of chattels, therefore, had at common law no absolute right or power to obtain their specific restitution (*g*). For this purpose, however, he could in special cases have recourse to the equitable and discretionary jurisdiction of the Court of Chancery (*h*). By the Common Law Procedure Act, 1854, s. 78, the law was altered by empowering the Court after judgment in an action of detinue to make on the application of the plaintiff an order for execution by way of specific delivery of the property. Such an order, however, was not as of right, and when the Court was of opinion that specific restitution would for any reason be unjust to the defendant, no such order would be made, and he would be left in enjoyment of that election between restitution and payment which the common law conferred on him (*i*). The jurisdiction to order specific restitution of chattels thus conferred by section 78 of the Common Law Procedure Act, 1854, is preserved by the Judicature Act and the Rules of the Supreme Court (*k*).

2. *When restitution will not be granted.*—The power of the Court to order specific restitution of chattels is discretionary and not a matter of right on the part of the plaintiff. Such an order, therefore, may be either refused altogether, or made only on such terms as to the Court seems necessary to do complete justice between the parties (*l*). This being so, it may be assumed that one or other of these courses will be adopted in all cases in which the value of the chattel exceeds the amount of damages to which the plaintiff is entitled. But when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and damages will fully compensate, the Court will not exercise its discretion to order specific restitution (*m*). If the defendant has, since taking the property, increased

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(*g*) *Donald v. Suckling* (1866), L. R. 1 Q. B. 585, 601; Chitty's Pleadings, I, p. 139 (7th ed.).

(*h*) *Pusey v. Pusey* (1684), 1 Vern. 273; *Falcke v. Gray* (1859), 4 Drew. 651; *Fells v. Read* (1796), 3 Vesey 70.

(*i*) *Chilton v. Carrington* (1855), 24 L. J. C. P. 78.

(*k*) Order 42, r. 6. Order 48, r. 1. *Hymas v. Ogden*, [1905] 1 K. B. 246; *Bailey v. Gill*, [1919] 1 K. B. 41.

(*l*) *Chilton v. Carrington* (1855), 15 C. B. 740, *per* Maule, J.; *Peruvian Guano Co. v. Dreyfus Bros.*, [1892] A. C. p. 176, *per* Lord Macnaghten.

(*m*) *Whiteley, Ltd. v. Hilt*, [1918] 2 K. B. p. 819, *per* Swinfen Eady, M.R.; *Cohen v. Roche*, [1927] 1 K. B. 169. If the action is brought in contract, the Court has a similar discretion: Sale of Goods Act, 1893, s. 52.

the value of it by his own labour or expenditure, the plaintiff, as we have already seen, is entitled to recover as damages only its original and not its present value (n). This being so, it is clear that if the plaintiff seeks specific restitution instead of damages, the Court must either refuse this remedy altogether, or grant it only on the terms that the plaintiff shall make to the defendant a fair allowance in respect of the increased value of the property (o).

3. *Accessio, specificatio, and confusio in English law.*—It is in this circumstance that specific restitution is a matter of judicial discretion and not of right that we must find the solution in English law of all those puzzles concerning *accessio*, *specificatio*, and *confusio* which we find discussed with such unsatisfactory results in Roman law and the Continental systems founded upon it, and concerning which there is so little authority in our own system. *Accessio* is the combination of two chattels belonging to different persons into a single article: as when A's cloth is used to patch B's coat. *Specificatio* is the making of a new article out of the chattel of one person by the labour of another: as when A's corn is ground into flour by B, or his grapes are made into wine. *Confusio* or *commixtio* is the mixture of things of the same nature but belonging to different owners so that the identification of the things is no longer possible: as when A's money or wheat becomes mixed with that of B. In all these cases there are two questions to be asked which must be kept distinct. The first, which is of subordinate importance, is: In whom is the ownership of the new article so created? The second, which is independent of the first, is: Who is entitled to the possession of the new article, and on what terms will he be permitted to retain or recover it? As to the first of these questions, our law seems to be destitute of any adequate authority. Such authority as we have is mostly of ancient date, and shows a tendency to follow the conclusions of Roman law on this matter. It is submitted, however, that these authorities are of little weight at the present day, having regard to the modern developments of the law of conversion, and that the true principle of English law is that a man's property in chattels is not divested by any such events. If my corn is wrongfully taken from me and made into flour, the flour is mine; and if my tree is cut down and sawn into timber, the timber is mine (p).

(n) *Supra*, s. 79 (10).

(o) *Peruvian Guano Co. v. Dreyfus Bros.*, [1892] A. C. p. 176, *per* Lord Macnaghten.

(p) Y. B. 5 Hen. VII (1489), f. 15, pl. 6.

If my sheep become mixed with A's, so that their identification is impossible, by some accident for which neither of us is responsible, A and I are owners in common of the whole flock in the proportions of our respective contributions to it (q). If however the mixing has arisen from the fault of A, I can claim the goods. I have been guilty of no wrongful act, and therefore my possession of my own goods cannot be interfered with, and if by the wrongful act of A that possession necessarily implies the possession of the intruding goods of A, I am entitled to it, and so in effect I become owner of the whole (r).

Over and above the question of ownership, however, there arises the question of the right of possession. Here English law avoids all difficulties by making the matter one of judicial discretion unfettered by any general principles. The Court is left free in any such case to make an order for specific delivery of the property to the claimant who, having regard to all the circumstances, has the best right to it, and to impose on him such terms as are deemed just for compensating the other party for his interest in the property. It may be assumed that in all ordinary cases the Court will be guided by the relative values of the interests of the rival claimants. Possession will be awarded to him whose interest is the more substantial, on the terms that he pays the value of the other's interest. If A takes the horse of B, and puts new shoes on it, B will obtain specific restitution of the horse, but, it may be (s), only on paying for the shoes. But if A takes the marble of B, and makes a statue of it, B will ask in vain for specific restitution, and will be left to his claim for damages amounting to the original value of the marble (t).

(q) A similar principle was applied in equity in the case of money in *Sinclair v. Brougham*, [1914] A. C. 398. See Lord Sumner at pp. 459-60.

(r) *Colwill v. Reeves* (1811), 2 Camp. p. 576; *Buckley v. Gross* (1868), 3 B. & S. 566; *Lupton v. White* (1808), 15 Ves. 432; *Spence v. Union Marine Insurance Co.* (1868), L. R. 3 C. P. 427; *Sandeman & Sons v. Tyzack & Branfoot Steamship Co.*, [1913] A. C. 680, p. 694, per Lord Moulton. But Lord Moulton doubted whether this rule would be strictly adhered to in extreme cases where it would lead to substantial injustice, e.g., if a small portion of the goods of B became mixed with goods of A by a negligent act for which A alone was liable. And Salmond queried the rule altogether (6th ed., p. 406). See, however, Halsbury, i, 746. See also *The Nordborg*, [1939] P. p. 129.

(s) Holdsworth, H. E. L., vii, 503, disagrees; but see Lord Moulton's doubts referred to in the previous note. It certainly would seem to fall within the discretion of the Judge.

(t) The following further authorities on *accessio*, *specificatio*, and *confusio* in English law may be referred to: Y. B. 5 Hen. VII, f. 15, pl. 6; Cro. Jac. 366; Popham 38; Moore 19; 1 Hale's P. C. 513; Bl. Comm., II, 404; *Jones v. Moore* (1841), 4 Y. & C. (Ex.) 351. See also Kenny, Criminal Law, pp. 258-9. The modern Continental codes have largely abandoned the conclusions of Roman law, but the rules established in substitution are so vague and unsatisfactory as to lead

4. *Discretionary power to order plaintiff to accept restitution instead of damages.*—When property has once been converted, there is a vested right of action in trover, which is not divested by the fact that the owner subsequently accepts restitution of the property. Such a recovery of possession goes merely in mitigation of damages, and not in bar of the action. Therefore the plaintiff may still commence or proceed with his action for the recovery of such damages as are due in respect of his temporary dispossession (u).

But is the plaintiff bound to accept such a restitution of converted property; or can he refuse a tender of it, and insist on his right to sue for its value in trover? Under the old practice a tender of the goods was a good plea in an action of detinue, for this action was brought not for damages, but for the recovery of the goods themselves (w). In trespass and trover, on the contrary, the plaintiff had a good cause of action for the value of the goods, and was not bound to accept the goods themselves; and the only remedy of a defendant who was able and willing to restore the property was to apply to the Court to exercise its discretionary power of staying the action on delivery of the goods. After some hesitation and reluctance the Courts finally consented to exercise this power in cases in which it was just to the plaintiff that he should be thus compelled to accept the property, and in which complete justice could be so done to the parties (x).

How, then, does the matter stand under the modern practice? Presumably in this way: that if the plaintiff sues for specific restitution he is bound to accept a tender of the property, on the analogy of the old action of detinue; but if he chooses to sue merely for the value of the property (as in the old actions of trover and trespass) it is in the discretion of the Court whether and on what terms the action will be allowed to proceed, if the defendant offers to restore the property. If the plaintiff is anxious to recover possession of his chattel, he must sue in detinue, not for conversion, since the action for the latter gives the defendant the option of keeping the chattel (xx).

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irresistibly to the conclusion that English law is wise in treating the matter as one for the exercise of judicial discretion and not for the application of fixed principles. See the French Civil Code, ss. 565-77; German Civil Code, ss. 946-52.

(u) *Moon v. Raphael* (1835), 2 Bing. N. C. 310.

(w) *Crossfield v. Such* (1852), 8 Ex. 159.

(x) *Tucker v. Wright* (1826), 3 Bing. 601: "When complete justice can be done by the delivery of a specific chattel, the Court will sometimes interfere to stay proceedings."

(xx) *Whiteley, Ltd. v. Hilt*, [1918] 2 K. B. 808.

## § 83. Trespass to Chattels

1. *Trespass to chattels defined.*—The wrong of trespass to chattels consists in committing without lawful justification any act of direct physical interference with a chattel in the possession of another person—that is to say, it is such an act done with respect to a chattel as amounts to a direct forcible injury within the meaning of the distinction drawn in the old practice between the writ of trespass and that of trespass on the case (*y*). Thus, it is a trespass to lay hands upon a chattel or to do wilful damage to it. Even negligent damage, if direct and not merely consequential, falls within the scope of trespass: as in the case of a negligent collision between two vehicles (*z*).

2. *Physical contact not essential.*—Physical interference usually consists in some form of physical contact—some application of force by which the chattel is moved from its place or otherwise affected. But this is not essential. It is presumably a trespass wilfully to frighten a horse so that it runs away, or to drive cattle out of a field in which they lawfully are (*zz*), or to kill a dog by giving it poisoned meat.

3. *Trespass and conversion.*—The wrong of trespass is partially coincident with that of conversion. A wilful trespass causing a loss of the possession of the chattel is also a conversion. But there may be trespass without conversion, and conversion without trespass. Thus, the mere asportation of a chattel without the infliction of any damage may be a trespass, as by the removal of a chattel from one room to another without authority, express or implied, otherwise than for the purpose of preserving it (*a*).

4. *Trespass actionable per se.*—A trespass to chattels is actionable *per se* without any proof of actual damage (*b*). Any unauthorised touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. It may be very necessary for the protection of certain kinds of property, e.g., museum specimens, that this should be the law (*c*).

5. *Inevitable accident.*—There seems no reason why the rule as

(*y*) *Supra*, s. 2.

(*z*) *Lcame v. Bray* (1803), 3 East 593. *Vide supra*, s. 2 (2).

(*zz*) *R. v. Riley* (1853), 22 L. J. M. C. 48.

(*a*) *Isaack v. Clarke* (1614), 2 Buls. p. 312; *Kirk v. Gregory* (1876), 1 Ex. D. 55. Cp. *Fouldes v. Willoughby*, *supra*, s. 73 (2).

(*b*) *Per Lord Blanesburgh in Leitch & Co. v. Leydon*, [1931] A. C. p. 106.

(*c*) See Pollock, p. 280. *Contra*, Street, Foundations, I, 16.

to inevitable accident should be different in the cases of trespass to goods and trespass to land. Atkin, L.J., was clearly of opinion that the same rule applies in all forms of trespass, including trespass to the person (*d*). We need not therefore repeat what is said elsewhere in this volume (*e*).

6. *The title of the plaintiff*.—Trespass to chattels, like trespass to land, is essentially an injury to possession and not to ownership. The plaintiff, therefore, in an action of trespass must have been in actual possession at the time of the interference complained of (*f*). To this there are three exceptions:—

(1) A trustee out of possession can bring trespass against third parties on the strength of his right to immediate possession (*g*);

(2) An executor or administrator may sue for a trespass committed to the goods of the deceased after his death but before the grant of probate or letters of administration (*h*); his title relates back to the time when the trespass was committed.

(3) The owner of a franchise which entitles him to goods can bring trespass in respect of interference with the goods before he has actually seized them (*i*) (*k*).

Further in the case of a bailment at will the bailor does not lose his possession any more than the master does when his chattels are in the custody of his servant; both bailor at will and master can bring trespass against a third person but not against the bailee or servant (*l*).

The *jus tertii* can only be successfully pleaded where the defendant acted under it. Even a wrongdoer with possession can bring trespass against a person without title (*m*), but not against the owner of the goods or any one acting under his authority (*n*).

(*d*) *Manton v. Brocklebank*, [1923] 2 K. B. p. 229. See, however, Gold in 21 Bell Yard, pp. 36-7.

(*e*) *Supra*, s. 47 (3); *infra*, s. 90 (15).

(*f*) *Ward v. Macauley* (1791), 4 T. R. 489.

(*g*) *White v. Morris* (1852), 11 C. B. 1015; *Barker v. Furlong*, [1891] 2 Ch. 172.

(*h*) *Tharpe v. Stallwood* (1843), 5 M. & G. 760.

(*i*) *Bailiffs of Dunwich v. Sterry* (1831), 1 B. & Ad. 831.

(*k*) Some writers, amongst whom was Sir John Salmond, have inferred from these cases that a right to possession always carries the right to bring trespass, but this is inconsistent with the statutory origin of the crimes of receiving stolen goods and embezzlement, and with *R. v. Clinton* (1869), 4 Ir. R. C. L. 6. See P. & W., Possession, pp. 145-7; Holdsworth, H. E. L., vii. 422-4.

(*l*) *Lotan v. Cross* (1810), 2 Camp. 464; *White v. Morris* (1852), 11 C. B. pp. 1028, 1030. Cp. *Attersoll v. Stevens* (1808), 1 Taunt. p. 190; *supra*, s. 48 (1), n. (*n*) (trespass to land).

(*m*) *Woodson v. Newton* (1727), 2 Str. 777.

(*n*) *Blades v. Higgs* (1865), 20 C. B. (n.s.) 214.

7. *Measure of damages.*—If the plaintiff has been deprived of his goods, the measure of damages is the value of the goods, but if the defendant has an interest in the goods it is limited to the value of the plaintiff's interest (o). If the plaintiff has not been deprived of the goods, it is the loss actually suffered as the direct consequence of the trespass, but if the trespass was accompanied by aggravating circumstances the Court will not inquire too nicely into the jury's verdict (p).

#### § 84. Replevin (q)

1. *Nature of the remedy of replevin.*—Whenever chattels are taken by one person out of the possession (r) of another, whether by way of distress or otherwise, the latter may by way of proceedings in replevin recover immediate and provisional possession of them, pending the result of an action brought by him to determine the rights of the parties.

2. The right to replevy goods is a right to get them back at once and provisionally, instead of having first to establish one's title to them in an action of trover, detinue, or trespass. Application is made by the claimant (called the replevisor) to the Registrar of the county court within the jurisdiction of which the goods were taken, and he issues a warrant for their restitution on security being given by the replevisor, by way of bond or deposit of money, that he will commence and prosecute, either in the county court or in the High Court, an action of replevin, in which the title to the goods and the rights of the parties shall be determined (s).

3. *When replevin available.*—Replevin is allowable only when the chattels have been taken by a trespass by the defendant out of the plaintiff's possession. It is not available for a mere detention or for any other dispute as to the title or right of possession. The process is based on the presumption that the possessor of goods is the owner of them, and that a seizure of them is illegal, conferring

(o) *Brierly v. Kendall* (1852), 17 Q. B. 987.

(p) *Brewer v. Dew* (1843), 11 M. & W. 625; *G. W. K. v. Dunlop* (1926), 42 T. L. R. 376.

(q) An excellent discussion of this action will be found in Sutton, *Personal Actions*, pp. 66-71.

(r) So that a bailee can make a claim in replevin: *Swaffer v. Mulcahy* (1933), 150 L. T. 240. *Contra*, *Templeman v. Case* (1711), 10 Mod. 24.

(s) As to the procedure in replevin, see the County Courts Act, 1934, ss. 101-3, and County Court Rules, 1936, O. 33.

therefore upon the possessor a right to their provisional restoration pending an inquiry into the title (*t*).

4. The right of replevin is usually exercised only in cases of distress, whether for rent, for rates (*tt*), damage feasant, or otherwise, though it is legally available for all forms of taking whether under colour of distress or not (*u*). In an action of replevin the plaintiff must show that the distress was unlawful; if therefore it was levied under a distress warrant he must show that the warrant issued by the justices was issued without jurisdiction (*w*).

5. *Effect of replevin*.—If the plaintiff succeeds in an action of replevin, he keeps the property which has been thus provisionally restored to him, and has judgment for all damages and costs resulting from the defendant's seizure of it (*x*). If the defendant succeeds, he has judgment for the restitution of the property, or in the alternative (when his claim is one of distress for rent), if he so requests, for the payment of the amount claimed by him or (where the claim is one of distress damage feasant), if the plaintiff so requests, for the amount of the damages sustained by him (*y*).

### § 85. Rescous and Pound-Breach

At common law a landlord could not sell the goods which he had distrained, but by the Sale of Distress Act, 1689, he was given a power of sale after five days, and it was further provided that upon any pound-breach or rescous of goods or chattels distrained for rent the person aggrieved thereby should in a special action upon the case for the wrong thereby sustained recover treble damages. By the Distress for Rent Act, 1737, s. 10, the landlord was enabled to impound the distress upon the premises and have the goods sold there. The Law of Distress Amendment Act, 1888, s. 6, extended the period during which the owner of goods distrained might replevy them from five to fifteen days. Rescous involves the rescue of distrained goods before they reach the pound; pound-breach arises after they have been impounded. Once goods are impounded they

(*t*) *Mennie v. Blake* (1856), 6 E. & B. 842; *Shannon v. Shannon* (1804), 1 Sch. & Lef. 324. For the relation of the doctrine of trespass *ab initio* to replevin see the learned article by G. L. Williams in 52 L. Q. R. 106.

(*tt*) *L. C. C. v. Hackney B. C.*, [1928] 2 K. B. 588.

(*u*) *Shannon v. Shannon* (1804), 1 Sch. & Lef. 324; County Court Rules, 1936, O. 33, r. 3.

(*w*) *L. C. C. v. Hackney B. C.*, [1928] 2 K. B. 589.

(*x*) *Gibbs v. Cruickshank* (1873), L. R. 8 C. P. 454; *Smith v. Enright* (1893), 69 L. T. 724.

(*y*) County Court Rules, 1936, O. 33, rr. 1-3.



are *in custodia legis*, and if a pound has been created it must be respected not merely by the tenant, but by strangers as well (z). It is no defence that the defendant did not know that the goods were impounded. In order to constitute the offence of pound-breaking there must, however, be either pound-breaking in fact or some act knowingly done to assist somebody else to commit a pound-breach. He who innocently takes away the goods after the pound-breach has been completed and the goods are out of the pound is not liable (z).

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(z) *Latell & Co. v O'Leary*, [1933] 2 K B 200, where most of the law on this topic is discussed. See also Cl. & L., pp 334-6.

## CHAPTER X

## INJURIES TO REVERSIONARY INTERESTS

## § 86. Injuries to Reversionary Interests in Land

1. Trespass and nuisance are essentially injuries to the possession of land, and not to the ownership of it. We will now, therefore, consider the position of a reversioner—using that term in a wide sense to include any person having a lawful interest in land but not the present possession of it, the typical case being that of a landlord whose land is in the occupation of a tenant.

*Waste.*—Injuries to reversionary interests are of two kinds, according as they are committed (1) by the tenant or other person in possession of the land, or (2) by a stranger. Injuries of the first kind may be included under the generic title of Waste, which may be defined as unlawful damage done or permitted by the occupier of land as against those having reversionary interests in it. An account of the law of waste does not pertain to the law of torts, but is a branch of the law of property, and in particular of the law of landlord and tenant: for the obligations of the occupier to the reversioner are dependent on the nature of the proprietary or contractual relation existing between them in the particular case, and cannot be profitably considered in a general account of the law of torts (a).

It is otherwise with the second class of injuries to reversionary interests—*viz.*, those which are committed not by the occupier, but by strangers. These injuries are governed by general principles which properly pertain to the law of torts. The question, therefore, which we have now to consider is this: In what circumstances will an action lie at the suit of a reversioner for an act done in respect of the land by a stranger who is not in possession of it?

2. *Reversioner can sue for permanent injury only.*—A reversioner

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(a) As regards the reversioner, the law treats waste as breach of a contractual obligation, although voluntary waste is also the subject-matter of an action of tort: *Defries v. Milne*, [1913] 1 Ch. 98; *Marsden v. Heyes*, [1927] 2 K. B. 1. The obligation of a tenant for life to a remainderman for permissive waste is not based on tort, but on the equitable principle that he who takes the benefit must fulfil the condition on which he takes it: *Jay v. Jay*, [1921] 1 K. B. 826. Cp. Cheshire, *Real Property*, pp. 385-6; and see Halsbury, *xxix*, pp. 642-3.

may sue for any trespass or nuisance if, and only if, it actually affects his reversionary interest; and in general this is so only if the effects of the injury so committed are permanent. None of these wrongs is *per se* a wrong against the reversioner or actionable at his suit. It is necessary for him in every case to prove not merely that such a wrong has been committed, but also that his reversionary interest has been actually affected by it, so that it is a wrong against him and not merely against the possessor. There is more than one way in which a reversionary interest may be so affected, but in general it is affected only by reason of the permanence of the consequences of the wrongful act. Temporary consequences give a cause of action only to the occupier; permanent consequences give a cause of action both to him and to the reversioner. Consequences are permanent in this sense if they are of such a nature that they will continue to affect the land, even after the interest of the reversioner has become an interest in possession (*b*). Accordingly a mere trespass, unaccompanied by any physical injury to the land, is not actionable at the suit of a reversioner, even though committed under a claim to a right of way (*c*); neither is a temporary nuisance, such as noise or smoke, which causes no enduring physical harm to the property (*d*). It is otherwise, however, if permanent physical harm is done, whether by way of trespass, nuisance, or otherwise: as, for example, the destruction of a building, the removal of soil, the cutting of timber, or structural damage done to a building by the removal of support (*e*).

3. *Permanent and continuing injuries distinguished.*—In applying this rule we must be careful not to confound a permanent injury with a continuing one. A permanent injury is a completed wrong the consequences of which will endure until the interest of the reversioner has fallen into possession, and for which accordingly he has a present right of action—*e.g.*, the destruction of a building on

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(b) *Cp. Rust v. Victoria Graving Dock* (1887), 36 Ch. D. p. 130, *per* Cotton, L.J.; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. p. 318, *per* Lindley, L.J.

(c) *Baxter v. Taylor* (1832), 4 B. & Ad. 72; *Cooper v. Crabtree* (1882), 20 Ch. D. 589.

(d) *Jones v. Chappell* (1875), 20 Eq. 539; *Mott v. Shoolbred* (1875), 20 Eq. 22.

(e) *Alston v. Scales* (1892), 9 Bing. 3; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Tucker v. Newman* (1839), 11 A. & E. 40; *Rust v. Victoria Graving Dock* (1887), 36 Ch. D. 113. In exceptional cases, however, even a temporary disturbance of possession may amount to an injury to the reversion, as in *Bell v. Midland Ry.* (1861), 10 C. B. (N.S.) 287, in which the royalties payable by a tenant to his landlord were diminished by the wrongful disturbance of a right of way appurtenant to the land.

land in the possession of the plaintiff's tenant. A continuing injury, on the other hand, is one which is still in process of being committed—*e.g.*, a nuisance caused by the smoke or noise of a factory. We have already seen (f) that even the occupier himself cannot recover damages for the future continuance of such a continuing injury, howsoever probable that continuance may be (g). He recovers damages only for the past; and if the wrong continues, he may sue a second time on a new cause of action thus arising. So the reversioner *a fortiori* must wait until his interest falls into possession, and then, if the injury still continues, he will have his action.

4. *Reversioner may sue to prevent prescriptive rights.*—Notwithstanding the preceding rule as to the necessity of permanent damage, a reversioner may sue for any continuing injury which by virtue of the law of prescription will by its continuance prejudicially affect his reversionary interest in the land by creating or destroying a servitude in relation thereto. On this principle it has been repeatedly decided that a reversioner may sue for an obstruction to ancient lights or for interference with a right of way (h). The operation of the rule depends on the law of prescription. A detailed consideration of the scope and application of this rule, therefore, pertains to the law of prescription rather than to that of torts, and would here be out of place (i).

### § 87. Injuries to Reversionary Interests in Chattels

1. *Action by reversionary owner.*—We have already seen (k) that a person not in actual possession and not entitled to immediate possession could not sue in trover, even though he was the owner of the property. Thus no action of trover would lie at the suit of a bailor of goods for a fixed term (l); or at that of a purchaser of goods which were still held by the vendor under his lien (m); or at

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(f) *Supra*, s. 35 (5) and (6).

(g) Save when damages are awarded in substitution for an injunction as the price of the legalisation of future continuance. *Supra*, s. 35 (9).

(h) *Jesser v. Gifford* (1767), 4 Burr. 2141; *Metropolitan Association v. Petch* (1858), 5 C. B. (n.s.) 504; *Shadwell v. Hutchinson* (1831), 2 B. & Ad. 97; *Mott v. Shoolbred* (1875), 20 Eq. 22; *Kidgill v. Moor* (1850), 9 C. B. 364. The reasoning in several of these cases is unsatisfactory owing to the fact that insufficient attention has been given to the distinction between the present rule as to the effect of prescriptive rights and the rule already considered as to the necessity of permanent damage.

(i) See Gale on Easements, pp. 216–24, pp. 510–16 (10th ed.).

(k) *Supra*, s. 76 (1).

(l) *Gordon v. Harper* (1796), 7 T. R. 9.

(m) *Lord v. Price* (1874), L. R. 9 Ex. 54.

that of a pledgor, or of the holder of a bill of sale before default made by the debtor (*n*). A similar rule limited the application of the action of detinue (*o*) and of trespass *de bonis asportatis* (*p*). In all such cases the remedy of the plaintiff was not trover, but a special action on the case for the injury done to his reversionary interest. A bailor at will, however, retained a sufficient right of immediate possession to enable him to sue even a stranger (*q*).

2. Although a plaintiff entitled to immediate possession has a right of action in every case in which a conversion or trespass has been committed, a reversioner cannot sue unless by reason of the conversion or trespass he has been actually deprived, permanently or temporarily, of the benefit of his reversionary interest (*r*). Thus, he can sue if the chattel has been destroyed, or if it has been so disposed of that a valid title to it has become vested in a third person, as by sale in market overt. So also he can sue if, after his reversionary interest has fallen into possession, he is prevented from obtaining possession by reason of the previous act of conversion. But while his interest remains reversionary he cannot sue merely because the chattel has been wrongfully taken or detained from him who is entitled to the immediate possession of it. For *non constat* that his reversionary interest will be in any way affected.

3. *Reversionary interest in possessory title*.—We have seen (*s*) that a possessory title continues, although the possessory owner has delivered possession to some other person who holds the property on his behalf returnable at will. What, then, shall be said if the possessory owner, instead of merely bailing the goods at will, pledges them or bails them for a fixed term, or otherwise parts with the right to the immediate possession of them: is his possessory title thus destroyed, or does it still subsist as a reversionary interest capable of protection by action against third persons? This has never been decided, but it is submitted, on principle, that there is no reason for any such distinction between a bailment at will and one for a term,

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(*n*) *Halliday v. Holgate* (1868), L. R. 3 Ex. 299; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Bradley v. Copley* (1845), 1 C. B. 685.

(*o*) *Nyberg v. Handelaar*, [1892] 2 Q. B. 202.

(*p*) *Ward v. Macauley* (1791), 4 T. R. 489. Cp. Lord Blanesburgh in *Leitch & Co. v. Leydon*, [1931] A. C. pp. 103 *sqq.*

(*q*) *Manders v. Williams* (1849), 4 Ex. 339. Cp. *Supra*, s. 48 (1), n. (*n*); s. 83 (6).

(*r*) *Mears v. London & S. W. Ry.* (1862), 11 C. B. (n.s.) 850; *Donald v. Suckling* (1866), L. R. 1 Q. B. at p. 611; *Halliday v. Holgate* (1868), L. R. 3 Ex at p. 302. See criticism of this rule by Warren in 49 H. L. R. pp. 1100-9.

(*s*) *Supra*, s. 76 (5).

and that a possessory title may become reversionary and yet subsist, just as a legal title may. If this is so, a possessory owner who pledges the property or bails it for a term has not merely a title by estoppel against his own pledgee or bailee, but a title valid against all persons except the true owner.

4. *Measure of damages.*—The rule that the full value of the property can be recovered even by a plaintiff with a limited interest does not extend to a plaintiff suing in respect of some reversionary interest or right of future possession.

## CHAPTER XI

## TRESPASS TO THE PERSON

§ 88. Assault and Battery

1. *Battery*.—The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is actionable (a). For the interest that is protected by the law of assault and battery is not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person. In respect of his personal dignity, therefore, a man may recover substantial damages for battery which has done him no physical harm whatever (b), as when a man's finger-prints are taken without his consent before he has been committed for trial (c).

2. *Meaning of term force*.—Intentionally to bring any material object into contact with another's person is a sufficient application of force to constitute a battery; for example, to throw water upon him, or to pull a chair from under him whereby he falls to the ground (d). So it is a battery forcibly to take from him some chattel which he holds (e).

3. *Assault without battery*.—The act of putting another person in reasonable fear of an immediate battery by means of an act amounting to an attempt or threat to commit a battery amounts to an actionable assault (f). Mere words do not constitute an

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(a) *Cole v. Turner* (1701), 6 Mod. 149, per Holt, C.J.

(b) *Supra*, s. 33.

(c) Possibly at any time before he has been convicted, see *Dumbell v. Roberts* (1944), 60 T. L. R. p. 233, per Scott, L.J. Such damages may probably be taken into account in an action for false imprisonment: *ibid*.

(d) *Pursell v. Horn* (1838), 8 A. & E. 602; *Hopper v. Reeve* (1817), 7 Taunt. 698.

(e) *Green v. Goddard* (1704), 2 Salk. 610.

(f) In popular speech the term "assault" includes a battery, and Salmond (9th ed., s. 95 (6)) saw no reason why legal terminology should not acknowledge the same use of it. Cf. Pollock, p. 171. But an assault involves intention and it is submitted that a battery does not, *vide infra*, s. 90 (15), n. (g), though Salmond (9th ed., s. 95 (1)) thought otherwise, as does Winfield, p. 232. But Winfield, p. 235, shows that even in his view a battery does not always include an assault, and it is quite clear that a person may be guilty of an assault without being guilty of a battery: *Jones v. Sherwood*, [1912] 1 K. B. 127.

assault, however insulting or even menacing; the intent to do violence must be expressed in threatening acts, not merely in threatening speech (g). Even threatening acts do not constitute an assault unless they are of such a nature as to put the plaintiff in fear of immediate violence. To shake one's fist in a man's face is an assault; to shake it at a man who by his distance from the scene of action is inaccessible to such violence is none (h).

There need be no actual intention or power to use violence, for it is enough if the plaintiff on reasonable grounds believes that he is in danger of it. Thus, it is actionable to point a gun at a man in a threatening manner, even though to the knowledge of the defendant, but not to that of the plaintiff, it is unloaded (i). But if there is no reasonable fear, there is no assault: as, for example, when a gun is pointed at a man behind his back (j).

4. *Assault a criminal offence.*—An assault is not merely a tort, but also a criminal offence, and the civil and criminal remedies are in general concurrent and cumulative. It is provided, however, by the Offences against the Person Act, 1861, that *summary* criminal proceedings, whether they result in a conviction or an acquittal (after an actual hearing on the merits), are a bar to any subsequent civil proceedings for the same cause.

### § 89. False Imprisonment

1. *False imprisonment defined.*—The wrong of false (k) imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is.

2. *Distinguished from assault.*—The wrong of false imprisonment is in most cases that of assault also, but not necessarily so; locking a man up in a room in which he already is by his own act amounts to false imprisonment, but is no assault. In any case imprisonment is so special a form of assault as to require separate classification and consideration.

(g) *Meade's and Belt's Case* (1823), 1 Lew. 184.

(h) *Stephens v. Myers* (1830), 4 C. & P. 349.

(i) *R. v. St. George* (1840), 9 C. & P. 483, at p. 493. See J. W. C. Turner in 7 Camb. L. J., pp. 63-7.

(j) See, on the whole matter, *Tuberville v. Savage* (1669), 1 Mod. 3; *Stephens v. Myers* (1830), 4 C. & P. 349; *Read v. Coker* (1853), 13 C. B. 850; *Osborn v. Veitch* (1858), 1 F. & F. 317.

(k) The term *false* is here used not in the ordinary sense of mendacious or fallacious, but in the less common though well-established sense of erroneous or wrong; as in the phrases false quantity, false step, false taste, etc.



3. *What amounts to imprisonment.*—To constitute the wrong in question there need be no actual imprisonment in the ordinary sense—i.e., incarceration. It is enough that the plaintiff has been in any manner wrongfully deprived of his personal liberty. A mere unlawful arrest, for example, amounts in itself to false imprisonment, and so does any act whereby a man is unlawfully prevented from leaving the place in which he is: for example, a house or a ship (l).

4. *Actual force not necessary.*—Nor is it needful that there should be any actual use of force. A threat of force, whereby the submission of the person threatened is procured, is a sufficient ground for such an action: for example, showing a man a warrant for his arrest and thereby obtaining his submission is itself an arrest, if it amounts to a tacit threat to execute the warrant by force if necessary; *aliter* if it amounts merely to a request, with no threat or intent to use force (m). A man may even be imprisoned without knowing it. “A person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious and while he is a lunatic. So a man might in fact be imprisoned by having the key of a door turned against him so that he is imprisoned in a room in fact although he does not know that the key has been turned” (n).

5. *Partial deprivation of liberty not false imprisonment.*—To constitute imprisonment the deprivation of the plaintiff's liberty must be complete—that is to say, there must be on every side of him a boundary drawn beyond which he cannot pass. It is no imprisonment to prevent him from going in some directions, while he is left free to go as far as he pleases in others. Thus, no action for false imprisonment will lie for unlawfully preventing the plaintiff from going along the highway and compelling him to go back (o).

6. *Failure to afford facilities for leaving premises.*—Towards persons who are upon his premises and who are unable to leave them unless active measures are taken by him in that behalf, an

(l) *Warner v. Riddiford* (1859), 4 C. B. (n.s.) 180.

(m) *Grainger v. Hill* (1838), 4 Bing. N. C. 212; *Arrowsmith v. Le Mesurier* (1806), 2 B. & P. N. R. 211; *Berry v. Adamson* (1827), 6 B. & C. 528. *Semble*, the signing of the charge-sheet is sufficient to constitute false imprisonment: *Clubb v. Wimpsey* (1936), 1 A. E. R. 69.

(n) *Meering v. Grahame-White Aviation Co.* (1919), 122 L. T. p. 53, *per* Atkin, L.J. But this case has been criticised by Goodhart (83 Penn. L. R. p. 418), and is inconsistent with *Herring v. Boyle* (1834), 1 C. M. & R. 377, which is adopted in the American Restatement, s. 42.

(o) *Bird v. Jones* (1845), 7 Q. B. 742; *Robinson v. Balmain Ferry Co.*, [1910] A. C. 295. See the discussion of this case by Amos in 44 L. Q. R. 464.

occupier owes no duty to take such measures. If he fails or refuses to do so he is not liable to an action of false imprisonment. If my neighbour falls down a pit upon my land I am under no obligation to pull him out. In *Herd v. Weardale Steel Coke and Coal Co.* (p) certain miners, having been lowered down the defendants' mine, wrongly refused to continue their work, and demanded that they should at once be taken to the surface. The defendants, however, refused to do so, and stopped the working of the cage, by reason of which the miners were compelled to remain for some little time in the mine against their will but brought them back at the ordinary time when their shift ended. In an action for false imprisonment it was held by the House of Lords that it was a case of *volenti non fit injuria*. Even if the motive was to punish the plaintiffs, there was no cause of action, though it might have been otherwise if it had been a case of sudden illness.

In *Herd's Case* there was no breach of contract by the defendants. Where the detention is in breach of a contract between the parties, it may be a question whether the detention amounts to the tort of false imprisonment or merely to a breach of contract (q). In *Herd's Case* in the Court of Appeal, the opinion was expressed by Buckley, L.J., and Hamilton, L.J., that the injury in such a case was a breach of contract only (r). This, however, may be a matter of some doubt. The case may be one of those in which the defendant, by making a contract, places himself in such a position that he cannot break it without also committing a tort. A surgeon who commences an operation and then refuses or neglects to complete it, is clearly liable in tort as well as in contract for any injury so inflicted on his patient, though he was under no duty apart from his contract to perform the operation at all. So if a mining company takes a miner down the shaft, and in breach of contract refuses to bring him up again, it may well be that on the same principle the resulting imprisonment of the plaintiff is an actionable tort. The question is of practical importance for the reason, *inter alia*, that it is only in an action of tort that exemplary damages are recoverable.

#### 7. Continuance of lawful imprisonment.—To continue a lawful

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(p) [1913] 3 K. B. 771; [1915] A. C. 67; a similar case is *Burns v. Johnston*, [1916] 2 Ir. R. 444; [1917] 2 Ir. R. 137.

(q) Salmond suggested (9th ed., p. 374) that there were other cases than breach of contract in which the facts might impose on the defendant a positive legal obligation to take active measures for the plaintiff's release. Perhaps he was thinking of sudden illness. See also Winfield, 241, n. (b).

(r) [1913] 3 K. B. p. 789, p. 793.

imprisonment longer than is justifiable is actionable as false imprisonment (s).

8. *Habeas corpus*.—The remedy for false imprisonment is not merely an action for damages, but the recovery of liberty by means of a writ of *habeas corpus*. The law as to this latter remedy pertains, however, to procedure, and cannot here be appropriately considered.

9. *False imprisonment distinguished from malicious prosecution and abuse of process*.—No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a Court of Justice, even though that judgment or order is erroneous, irregular, or without jurisdiction. The proper remedy for wrongfully procuring the judicial imprisonment of the plaintiff is not an action for false imprisonment, but one for malicious prosecution or other malicious abuse of legal process, the nature of which we shall have to consider in a subsequent chapter. We shall there see that in an action of that description the plaintiff can succeed only if he proves both malice and the absence of any reasonable and probable cause for the proceedings complained of; whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is created, in general, even by honest and inevitable mistake (t). The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings.

Thus, in *Austin v. Dowling* (u) it is said by Willes, J.: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon a magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment". Accordingly, if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprison-

(s) *Mee v. Cruikshank* (1902), 86 L. T. 708; *Migotti v. Colvill* (1879), 4 C. P. D. 233; *Morris v. Winter*, [1930] 1 K. B. 243.

(t) See Sutton, *Personal Actions*, p. 61.

(u) (1870), L. R. 5 C. P. p. 540.

ment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution (*w*).

The reason for this distinction is that a man cannot be sued in trespass, and so not for false imprisonment, unless he himself, whether personally or by his agent, has done the act complained of. A Court of Justice, however, is not the agent of the litigant, but acts in the exercise of its own independent judicial discretion. Therefore the acts of a Court of Justice cannot be imputed to the litigant at whose suit they have been done. The litigant can be charged only with having maliciously and without reasonable cause exercised his right of setting a Court of Justice in motion (*x*).

10. *Excess of jurisdiction.*—This exemption of the litigant from any liability for false imprisonment extends even to cases in which the Court ordering the imprisonment has acted without jurisdiction. It is the right of every litigant to bring his case before the Court, and it is for the Court to know the limits of its own jurisdiction and to keep within them (*y*).

11. *Liability for imprisonment by ministerial officers of the law.*—If, however, the litigant, after procuring a judicial order of imprisonment, proceeds to execute it by means of some ministerial officer whom he thereby makes his agent, he may thereby make himself responsible in an action for false imprisonment, if the order was one which ought not to have been made (*z*). Whether he will be so responsible or not depends on whether the order is of such a nature as, even though wrongful, to be a protection to those who act in reliance on it.

12. An action for false imprisonment will lie against any person who authorises or directs the unlawful arrest or detention of the plaintiff by a merely ministerial officer of the law, as distinguished from a judicial officer or Court of Justice. He who sets in motion a merely ministerial officer, such as a constable, has no protection similar to that which is extended to the litigant in a Court of Justice. He makes that ministerial officer his agent, and is responsible for

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(*w*) *Lock v. Ashton* (1848), 12 Q. B. 871; *Diamond v. Minter*, [1941] 1 K. B. 656.

(*x*) See *Brown v. Chapman* (1848), 6 C. B. 365; *West v. Smallwood* (1838), 3 M. & W. 418; *Hope v. Evered* (1886), 17 Q. B. D. 338; *Lea v. Charrington* (1889), 23 Q. B. D. 45, 272.

(*y*) *Carratt v. Morley* (1841), 1 Q. B. 18; *West v. Smallwood* (1838), 3 M. & W. 418; *Brown v. Chapman* (1848), 6 C. B. 365.

(*z*) *Painter v. Liverpool Gas Light Co.* (1836), 3 A. & E. 433.

any arrest or detention so procured or authorised, as if it were his own act. It is necessary, however, even in such a case to prove actual direction or authorisation, such as is sufficient to make the ministerial officer the agent of the defendant. Mere information given to such an officer, on which he acts at his own discretion, is no ground of liability (a).

### § 90. Justifiable and Excusable Trespass to the Person (b)

1. A trespass to the person may be justified on the ground (1) that the defendant was acting in self-defence; (2) that the defendant was acting to prevent a trespass or ejecting a trespasser; (3) sometimes that the plaintiff consented to the trespass; (4) that the defendant was acting in support of the criminal law or to secure the public peace; (5) that the defendant was administering reasonable chastisement in the exercise of parental or other authority. It may sometimes be excused on the ground that the trespass was due to an accident. We have already discussed (c) justification by reason of the consent of the plaintiff.

2. *Use of force in self-defence.*—It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. Force is not reasonable if it is either (a) unnecessary—i.e., greater than is requisite for the purpose—or (b) disproportionate to the evil to be prevented.

3. *Defence of other persons.*—In the older books a distinction is drawn between the defence of one's self and of certain persons with whom one is closely connected (such as a wife, child, or master) and the defence of a mere stranger (d). It may be safely assumed, however, that at the present day all such distinctions are obsolete, and that every man has the right of defending any man by reasonable force against unlawful force.

4. *Force must be reasonable.*—In order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than was necessary for the purpose in hand. For even though not more than necessary, it may be unreasonably disproportionate to the nature of the evil sought to be avoided. "A

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(a) *Hopkins v. Crowe* (1836), 4 A. & E. 774; *Grinham v. Willey* (1859), 4 H. & N. 496.

(b) On the subject of this section, see Beale, "Justification for Injury", 41 H. L. R. 553, and Miles, Dig. s. 931.

(c) *Supra*, s. 8.

(d) *Leward v. Baseley* (1695), 1 Ld. Raym. 62. See Winfield, p. 57.

man cannot justify a maim for every assault; as if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger" (e). One cannot lawfully defend himself against a trivial assault by inflicting death or grievous bodily harm, even though the assault cannot be prevented in any other way.

5. *Need not be limited to passive defence.*—He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defence. He may lawfully take measures of aggression on his own account, so long as he does not go beyond what is reasonable as a measure of self-defence. Nor need he make any request or give any warning, but may forthwith reply to force by force (f).

6. *Force to prevent trespass.*—It is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry.

7. *Right confined to occupiers.*—This right of using force against trespassers is conferred only on the occupier of the land (or his agents), for it is only the occupier who is entitled to complain of a trespass and to take legal proceedings in respect thereof. The mere use of property, therefore, without the exclusive possession of it, will not justify the use of force to exclude others (g).

8. *Request necessary.*—Except when a trespass is committed by actual force, the trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises, and a reasonable opportunity of doing so peaceably has been afforded to him. As against him who enters or seeks to enter by force, however, force may be forthwith used without any request made (h).

9. *Amount of force permitted.*—As to the amount of force that may be used against a trespasser, the general rule is that it must not exceed that which is indicated in the old forms of pleading by the phrase *molliter manus imposuit*. That is to say, it must amount to nothing more than forcible removal, and must not include beating,

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(e) *Cook v. Beal* (1697), 1 Ld. Raym. 176; *Cockcroft v. Smith* (1705), 11 Mod. 43; *Dale v. Wood* (1822), 7 Moore 33.

(f) *Green v. Goddard* (1704), 2 Salk. 641.

(g) *Dean v. Hogg* (1834), 10 Bing. 345; *Holmes v. Bagge* (1853), 1 E. & B. 782; *Roberts v. Tayler* (1845), 1 C. B. 117. As against a mere wrongdoer, however, actual possession without title is doubtless sufficient, just as in an action of trespass.

(h) *Polkinhorn v. Wright* (1845), 8 Q. B. 197; *Green v. Goddard* (1704), 2 Salk. 641.

wounding, or other physical injury. Thus, in *Collins v. Renison* (i) the plaintiff sued for the assault of throwing him off a ladder, and it was held a bad plea that the plaintiff was trespassing and refused after request to leave the premises, and that the defendant thereupon "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff".

10. *Exceptions to general rule.*—There are two exceptions to this rule as to *molliter manus imposuit*:—

- (a) If the trespasser in the course of eviction makes or threatens to make an assault upon the person evicting him, the case becomes one of the defence of the person, and thereafter any force may be used which is reasonable within the rule as to self-defence already considered, even though it involves beating or physical harm (k).
- (b) If the trespasser enters or seeks to enter by means of a *forcible felony*, the case falls within the rule that any force is justifiable which is necessary to prevent the commission of a felony by force (l).

11. *Forcible entry distinguished.*—The forcible ejection of a trespasser must be carefully distinguished from forcible re-entry upon land of which possession has been wrongfully taken or detained. This case has already been considered (m).

12. *Defence of possession of chattels.*—Any person entitled to the possession of a chattel may defend his possession by the use of reasonable force, and the same rules presumably apply as in the case of the ejection of trespassers upon land (n).

13. *Arrest on suspicion of felony.*—The law relating to the arrest of criminals properly pertains to the law of criminal procedure and can only be dealt with here in the barest outline. It is the right, and indeed the duty (o), of every private citizen to arrest without warrant any person for a breach of the peace by an affray or by violence to an individual continuing in his presence or if there is a

(i) (1754), 1 Sayer 138.

(k) *Supra*, s. 90 (4).

(l) Stephen, *Digest of Criminal Law*, Art. 283 (7th ed.).

(m) *Supra*, s. 43. As to the right of an occupier to create a source of danger on his land for the purpose of preventing trespass, *vide infra*, s. 192.

(n) As to the reception of chattels, *vide supra*, s. 44.

(o) *R. v. Brown* (1841), C. & M. 314.

well-founded apprehension of its renewal (*p*), any person about to commit a felony or treason or any act endangering life (*q*), and any person whom he suspects upon reasonable and probable grounds of having committed a felony. The question of reasonable and probable cause is, as in the analogous case of malicious prosecution, a question for the Judge and not for the jury (*r*). There is a curious distinction between arrest by a private person and arrest by a constable. A private person justifying an arrest for a suspected felony must prove that the felony has actually been committed, whether by the person arrested or by some one else, and if in fact there has been no felony committed, it is no defence that there was reasonable and probable cause for believing the person arrested to be guilty. In the case of arrest by a constable, on the other hand, it is sufficient that there was reasonable and probable cause of suspicion, even if no felony has been in fact committed (*s*). Unlike the case of malicious prosecution, it is not necessary for liability that the arrest should have been malicious; it is enough that it was without reasonable and probable cause (*t*). The burden of proving the existence of reasonable and probable cause is on the defendant (*u*). There is no authority at common law for arresting without warrant on suspicion of a misdemeanour (*w*), except as above stated in the case of a breach of the peace, but by numerous statutory provisions power to effect such arrests is given in particular instances (*x*).

Further, a private individual is entitled to arrest a person who

(*p*) *Timothy v. Simpson* (1835), 1 Cr. M. & R. 757.

(*q*) *Coupey v. Henley* (1797), 2 Esp. 540; *Handcock v. Baker* (1800), 2 B. & P. 260.

(*r*) *Lister v. Perryman* (1870), L. R. 4 H. L. 521; *Hailes v. Marks* (1861), 7 H. & N. 56. *Infra*, s. 159 (9). As to what is, and what is not, a reasonable and probable cause, see *McArdle v. Egan* (1933), 150 L. T. 412.

(*s*) *Beckwith v. Philby* (1827), 6 B. & C. 635; *Walters v. W. H. Smith & Sons*, [1914] 1 K. B. 595. As to what are reasonable grounds for suspicion and arrest, see *Dumbell v. Roberts* (1944), 60 T. L. R. pp. 232-3, *per* Scott, L.J. An arrest is not justified because there were reasonable and probable grounds for suspecting that the person arrested had committed out of the country an offence which would have been a felony if committed in this country: *Diamond v. Minter*, [1941] 1 K. B. 656.

(*t*) See *Hogg v. Ward* (1858), 27 L. J. Ex. 443; *Allen v. Wright* (1838), 8 C. & P. 522.

(*u*) *Hicks v. Faulkner* (1878), 8 Q. B. D. at p. 170. *Aliter* in actions for malicious prosecution.

(*w*) *Matthews v. Biddulph* (1841), 3 M. & G. p. 395.

(*x*) Most of these will be found in Cl. & L. (9th ed.), pp. 223-9. Important recent cases on the interpretation of these statutes are *Barnard v. Gorman*, [1941] A. C. 378; *Ledwith v. Roberts*, [1937] 1 K. B. 232; *Dumbell v. Roberts* (1944), 60 T. L. R. 231. See also *Stevenson v. Aubrook*, [1941] 2 A. E. R. 476, and *Winfield*, pp. 242-3.



has escaped from lawful custody (*y*) and in aid of officers of the law acting justifiably (*z*). He may also in an emergency arrest a person so disordered in his mind as to be dangerous to himself or others (*a*), but any but a very temporary confinement can only be justified if the provisions of the Lunacy Acts, 1890 and 1891 (*b*), are complied with.

14. *The authority of fathers and schoolmasters.*—A father has a right to the custody and control of the persons of his children until they are twenty-one, and whilst he has such control he may beat or imprison them by way of punishment so long as he acts reasonably (*c*). When a father sends his child to school he delegates to the schoolmaster all his own authority, so far as is necessary for the welfare of the child (*d*), and a schoolmaster therefore is entitled to administer reasonable chastisement to the child (*e*). "Any parent who sends a child to school is presumed to give to the teacher authority to make reasonable regulations and to administer to the child reasonable corporal punishment for breach of those regulations" (*f*). The schoolmaster's authority is not confined to the four walls of the school: in *R. v. Newport (Salop) JJ.* (*g*) it was held that a schoolmaster was justified in administering five strokes of a cane to a boy under sixteen who had contrary to the rules been smoking in the street during term after having returned home.

Similarly the master of a vessel at sea has disciplinary powers not only over the crew, but over the passengers (*h*).

It is impossible in this work to deal with the special position of the police and other officers of justice (*i*).

15. *Inevitable accident.*—It is often said that inevitable accident provides a good excuse for an act lawful in itself and done in a

(*y*) Cl. & L. p. 230.

(*z*) *Ibid.*, pp. 230-1.

(*a*) Bac. Ab. Trespass, D. 3; Brydall, Non Compos Mentis, pp. 100-2.

(*b*) Cl. & L. pp. 231-5. See also Mental Treatment Act, 1930, s. 16.

(*c*) Cl. & L. pp. 235-8.

(*d*) *Per* Cockburn, C.J., in *Fitzgerald v. Northcote* (1865), 4 F. & F. p. 689.

(*e*) *Cleary v. Booth*, [1893] 1 Q. B. 465; *Mansell v. Griffin*, [1908] 1 K. B. 947. Even a not very violent box on the ears has been held to be unreasonable and immoderate: *Ryan v. Fildes*, [1938] 3 A. E. R. 517.

(*f*) *Per* Lord Hewart, C.J., in *R. v. Newport (Salop) JJ.*, [1929] 2 K. B. 416, at p. 428.

(*g*) [1929] 2 K. B. 416.

(*h*) *Aldworth v. Stewart* (1866), 4 F. & F. 957.

(*i*) A good account will be found in Cl. & L. pp. 731-44. See also *Fisher v. Oldham Corporation*, [1930] 2 K. B. 364; *Horsfield v. Brown*, [1932] 1 K. B. 355; *Morris v. Winter*, [1930] 1 K. B. 243; *Thomas v. Sawkins*, [1935] 2 K. B. 249, and Goodhart's powerful criticism of that case in 6 Camb. L. J. 22.

reasonable and careful manner. Indeed, this may be said to be the generally accepted view (*k*), at any rate in text-books, since the decision of Denman, J., in *Stanley v. Powell* (*l*). In that case the defendant whilst firing at a pheasant accidentally and without negligence shot the plaintiff, who was employed to carry cartridges for a shooting party, with a pellet which ricocheted from a tree at a considerable angle.

The case might have been decided on the ground that the plaintiff had voluntarily accepted the risk by joining the party (*m*), but Denman, J., based his decision on the ground that even if the action were in trespass, not case, the injury being accidental the defendant could not be liable. Even if this be correct, there remains, however, a distinction of great practical importance between trespass and case; in trespass the defendant must affirmatively prove that he was not negligent; in case for injuries to the person generally (*n*) the plaintiff must affirmatively prove intent or negligence in the defendant (*o*). But it is submitted that the better view is that not every form of accident provides a good defence. To succeed in such a defence it seems that it is not enough for the defendant to prove that he was not negligent. So in *The Albano* (*p*), Lord Esher, M.R., said that "a person relying on inevitable accident must show that something happened over

(*k*) Salmond (6th ed.), p. 14; Pollock, pp. 106-15; Winfield, pp. 48-51; Holdsworth, viii, p. 454.

(*l*) For criticisms of this case, see Landon in Pollock, pp. 140-5; Gold in 21 Bell Yard, pp. 25-8; Beven, i, 568-70; Charlesworth, p. 178. If the case is correct, the law on this point has taken a departure from the earlier precedents. For its history, see Street's *Foundations of Legal Liability*, Vol. I, pp. 74-82; Pollock's *Torts*, pp. 106-14; Holmes's *Common Law*, pp. 84-9; Holdsworth, H. E. L., viii, pp. 453-8; Wigmore, 7 H. L. R. pp. 443-5, *Harvard Essays*, pp. 66-8, A. A. L. H., iii, pp. 505-7; Winfield and Goodhart in 49 L. Q. R. 369-70; Gold in 21 Bell Yard, pp. 5 *sqq.*

(*m*) Winfield, 55 L. Q. R. p. 451, makes the point that in such a case it would be unnecessary for the defendant to disprove negligence. But surely the plaintiff takes upon himself the risk of careful, not of careless, shooting. And, even if that is not so, the difference in no way invalidates the suggestion that the case might have been decided on that ground.

(*n*) Not always: see cc. xvi, xvii, xviii, xix.

(*o*) Bohlen, *Studies*, p. 550. So in Canada, *Bayley v. Love* (1924), 3 W. W. R. 155. Cp. Sutton, *Personal Actions*, pp. 56-63.

(*p*) [1892] P. 429. Cp. *Sadler v. S. Staffordshire Steam Tramways Co.* (1889), 23 Q. B. D. 17; and see Gold, 21 Bell Yard, p. 39. Under the old pleading there is no precedent in trespass of a declaration alleging negligence, nor is there any plea in the books of inevitable accident. On the general issue, the plea of not guilty operated as a denial only of the wrongful act alleged, and no other defence than such a denial was admissible. But under the issue raised by that plea the defendant might "prove that the act complained of was involuntary, as being the result of accident, or of some agency over which he had no control, so as not to be his act". Bullen and Leake (3rd ed.), p. 791. [In this passage the meaning of "accident" is clearly limited by the context.] Cp. Holmes, *Common Law*, p. 85.

which he had no control, and the effect of which could not have been avoided by the greatest care and skill". In other words, in such cases the defendant's act has not, strictly speaking, caused the accident (q).

### § 91. Measure of Damages in Actions for Injuries to the Person (r)

1. It seems right to treat under this head of two topics which are often dealt with in other connections (s), for they primarily involve questions as to the nature of damages. It may well be that a man has not a legally protected interest, "a personal right of the nature of property in his life, so that when it is diminished he loses something in the nature of valuable property" (t), but it is now settled that the loss of the normal expectation of life is a head of damage which can be recovered if the loss is in consequence of physical injuries caused by a tortious act (u). So also it is not clear whether to cause nervous shock is a substantive tort or whether shock is a particular instance of damage flowing from the commission of some particular tort (w), but it is now settled law that damages can be obtained for nervous shock.

2. *Damages for shortened expectation of life.*—In an action for personal injuries one head of damage which has always been recognised is for the pain and suffering of the injured party. In *Flint v. Lovell* (x) an exceptionally active gentleman of sixty-nine years was knocked down by the defendant's motor car and his doctor said that he could now no longer look forward to more than a year of invalid life (y). The Court of Appeal held that he might recover as an independent head of damage compensation for the shortening of his normal expectation of life. To many lawyers this seemed a novel head of damage, and they considered that damages for

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(q) Yet Salmond (6th ed.), s. 117, apparently thought that actions of trespass to the person were limited to cases of the *intentional* application of force. Such a limitation was expressly denied by Lord Ellenborough in *Covell v. Laming* (1808), 1 Camp. 497.

(r) The observations in this paragraph deal with actions of negligence as well as of trespass.

(s) As in previous editions of this work, and in one or the other case in Winfield, Dig., and Cl. & L.

(t) *Rose v. Ford*, [1937] A. C. p. 834, *per* Lord Atkin. Cp. Lord Roche at pp. 856-7. Lord Wright (at p. 848) thought that a man had "a legal right that his life should not be shortened by the tortious act of another". Cp. Parke, B., in *Armstrong v. S. E. Ry.* (1847), 11 Jur. p. 759.

(u) *Chant v. Read*, [1939] 2 K. B. at pp. 360-2, *per* Hallett, J.

(w) Winfield, p. 88, and the cases there cited.

(x) [1935] 1 K. B. 354.

(y) In the event he was still alive three years later: [1937] A. C. p. 833.

shortened expectation of life had hitherto been only taken into account as a subjective element in awarding damages for pain and suffering (z). They hoped that if the opportunity came the House of Lords would overrule *Flint v. Lovell*. The opportunity came two years later in *Rose v. Ford* (a), when the administrator of a girl of twenty-three, who died four days after a collision between two motor vehicles, claimed such damages as part of her estate under the Law Reform (Miscellaneous Provisions) Act, 1934 (b). The House of Lords held that *Flint v. Lovell* was rightly decided and that damages for loss of expectation or for shortening of life are properly taken into calculation. They denied that there was anything new in so doing (c).

The House of Lords recognised the difficulty of the problem which they had set the Courts. Yet it was not "impossible to form an estimate of the value of human life" as Parke, B., had said (d), though it was doubtless difficult. But it is well settled that the difficulty of assessment is no reason for not doing the best that can be done. "In one sense it is true", said Lord Wright (e), "that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate". In a later case (f) Greer, L.J., said that if the Court gave the plaintiff £10,000 or £20,000 it would not be giving him something that he would rather have than the continuance of his healthy life. But the damages cannot be estimated on that basis. A reasonable view of the case must be taken and a compensation which is fair in all the circumstances be given.

The chaos which might have been anticipated prevailed in Courts of first instance, not much relieved by a number of judgments in the Court of Appeal. It seemed to be accepted that the wealth or poverty of the deceased and except in extreme cases his earnings or income were to be eliminated from the calculation. A mean must be struck. In seeking for a mean, a normal or an average, without

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(z) The passage to this effect in the last edition of this book (at p. 363) was adopted as a part of his argument by unsuccessful counsel in *Rose v. Ford*, p. 330. Cp. C. K. Allen in 57 L. Q. R. p. 463; Kahn-Freund in 5 Mod. L. R. 81-6. So apparently Greer, L.J.: *Shepherd v. Hunter*, [1938] 2 A. E. R. p. 589.

(a) [1937] A. C. 826. *Vide supra*, s. 20 (3).

(b) *Vide supra*, s. 20.

(c) At pp. 834, 848-9.

(d) *Armstrong v. S. E. Ry.* (1847), 11 Jur. at p. 759.

(e) *Rose v. Ford*, [1937] A. C. p. 848.

(f) *Roach v. Yates*, [1938] 1 K. B. pp. 265-6.

any guidance the Judges were, as Goddard, L.J., said (g), "like a blind man looking for a black hat in a dark room". It was impossible to give a logical answer to the various questions that arose. Should a young child be given greater damages than a mature man because it had a greater expectation of life or smaller damages because life meant less to it? How were damages to be assessed in the case of the lunatic or miser or the man of suicidal tendencies? "There is no principle", said Goddard, L.J., in another case (h), "and can be no principle, beyond the principle that one is to give what is fair and moderate and to use common sense." Sums varying from £90 to £10,000 were awarded. The apprehension to which Lord Roche had confessed in *Rose v. Ford* (i) that this element of damage "might now assume a frequency and a prominence in litigation far greater than is warranted in fact, and becoming common form might result in the inflation of damages in undeserving cases" proved only too well founded.

3. *Benham v. Gambling*.—In *Benham v. Gambling* (k) the opportunity of checking this tendency to inflation was seized, and in a judgment concurred in by five other Law Lords, Lord Simon corrected the methods of estimating this head of loss which had grown up in a series of earlier cases and approved a standard of measurement which must result in much lower awards being given in the future than in the past. We need not therefore now consider those earlier cases (l) but confine ourselves to the principles laid down for the guidance of Judges and juries by Lord Simon, L.C. (1) The main rule is that, whether in the case of a child or an adult, very moderate figures should be chosen. "In putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables" (m). There are other subsidiary rules upon which guidance is also given. (2) The sum given is not to be determined by applying a statistical or actuarial test as to the number of days or years of life of which the individual has been deprived. For "the thing to be valued is not the prospect of length

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(g) *Mills v. Stanway Coaches*, [1940] 2 K. B. p. 349.

(h) *Gambling v. Benham*, [1940] 1 A. E. R. p. 280.

(i) [1937] A. C. pp. 861-2.

(k) [1941] A. C. 157, 168. Cp. *Cumper v. Potheary*, [1941] 2 A. E. R. p. 519. The reasoning was largely that of Goddard, L.J., in *Gambling v. Benham*, [1940] 1 A. E. R. 275, and *Mills v. Stanway Coaches*, [1940] 2 K. B. 334.

(l) Amongst the more interesting are *Turbyfield v. G. W. Ry.* (1937), 158 L. T. 135, and *The Azikarai Mendi*, [1938] P. 263.

(m) *Benham v. Gambling*, [1941] A. C. p. 168.

of days, but the prospect of a predominantly happy life" (n). The loss of a measure of prospective happiness was thereby in effect substituted for the shortening of life as the true head of damage in these cases (o). (3) But, though the Court must be satisfied that the circumstances of the individual life were calculated to lead on balance to a positive measure of happiness (based on the character or habits of the individual) the test is objective, not subjective. The estimate of what kind of future on earth the victim might have enjoyed is not the estimate which the victim himself may have made but that which should be made objectively. (4) The appropriate figure should be reduced in the case of a very young child. (5) The social position of the victim, his prospects of worldly possessions, the financial losses or gains of which he has been deprived are to be excluded from consideration.

Though it is yet too early to say how far the subsidiary rules will prove of much assistance to the Courts, it is clear that the House of Lords, by substituting £200 for £1,000 as the normal measure of damage for the loss of expectation of life in the case of a young child and by insisting upon the general need for moderation in such cases (p), has done much to undo the evil that was done by the decision in *Rose v. Ford* (q), though it is going too far to say that the problem of expectation of life was "given a solemn funeral by the House of Lords in *Benham v. Gambling*" (r). But it remains to be seen how far the rule in that case is of universal application. In *Benham v. Gambling* the victim was a child of two and a half years, who was unconscious from the moment of the accident to his death, and the Lord Chancellor said (s) that they were particularly considering the situation resulting under the Law Reform (Miscellaneous Provisions) Act, 1934, where the victim died before action brought or at any rate before judgment and that "stripped of technicalities, the compensation is not being given to the person who was injured at all". In other words, as Goddard, L.J., has said (t), the Court is in practice, in spite of the theory of the law, in

(n) *S. C.* p. 166.

(o) But why then should it not also be a special head of damage when a man is maimed for life?

(p) Atkinson, J., thinks that the maximum damages since *Benham v. Gambling* should be £500; *García v. Harland & Wolff*, [1943] 2 A. E. R. p. 486.

(q) [1937] A. C. 826.

(r) Kahn-Freund in a challenging article on "Expectation of Happiness" in 5 Mod. L. R. 81.

(s) [1941] A. C. at pp. 161, 168.

(t) *Mills v. Stanway Coaches*, [1940] 2 K. B. p. 348; *Gambling v. Benham*, [1940] 1 A. E. R. p. 280.

reality awarding a *solatium* to the relatives or even in some cases to the creditors. Does then this insistence upon moderation apply where the victim is still alive and suing in his own right, as in *Flint v. Lovell* (u) or *Roach v. Yates* (w)? In such cases Greer, L.J., thought the problem not so difficult (x). Goddard, L.J., thinks (y) that Lord Simon's opinion "clearly applies to all cases which may be brought for loss of expectation of life". It is probably of little importance whether that be so or not, for in cases where the plaintiff is the living victim the Judge or jury can always add what they think is appropriate to the damages given for pain and suffering.

This is so far as possible a picture of the law as it now stands as a result of the unfortunate decision in *Rose v. Ford*. Goddard, L.J., has asked (z) that the attention of the Legislature should be directed to the problem, and there is a wide demand for a change in the law. It is not within the province of this work to consider the various suggestions that have been made (a). The law as propounded in *Benham v. Gambling* is demonstrably not logical, but if Judges and jurors act with that common sense with which it is customary to credit them it does not seem that much substantial injustice will now be done.

4. *Pain and suffering. Nervous shock.*—Damages can be obtained for physical *pain*, even though unaccompanied by any bodily lesion or illness. In respect of merely mental suffering, on the other hand, such as fear, it seems that no action will lie even though it has been wilfully caused by the defendant (b). But illness due to nervous shock is actionable: as when the plaintiff suffers in health through the terror of a narrow escape from sudden death, or through agitation caused by a false alarm wilfully given by the defendant or by unlawful threats made by him (c). "The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised

(u) [1935] 1 K. B. 354.

(w) [1938] 1 K. B. 256.

(x) *Shepherd v. Hunter*, [1938] 2 A. E. R. p. 589.

(y) *Cumper v. Potheary*, [1941] 2 A. E. R. p. 519.

(z) *Gambling v. Benham*, [1940] 1 A. E. R. p. 279.

(a) See, for example, Langton, J.'s, article in 58 L. Q. R. 53, and suggestions in 57 L. Q. R. pp. 153, 465-6, and 5 Mod. L. R. p. 99. For Scots law see 57 L. Q. R. 298; for American cases see Goodhart in 82 L. J. (N.) 253, 311.

(b) *Lynch v. Knight* (1861), 9 H. L. C. at p. 598, *per* Lord Wensleydale; *Dulieu v. White*, [1901] 2 K. B. at p. 678, *per* Kennedy, J. But see Lord Porter in *Bourhill v. Young*, [1943] A. C. p. 113.

(c) *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Dulieu v. White*, [1901] 2 K. B. 669; *Bell v. Gt. N. Ry.* (1890), 26 L. R. Ir. 428; *Janvier v. Sweeney*, [1919] 2 K. B. 316.

that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system" (d). In *Dulieu v. White* (e) Kennedy, J., expressed the view that "the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself". But the Court of Appeal took a different view in *Hambrook v. Stokes Bros.* (f), where a lorry belonging to the defendants was left unattended with the engine running. It ran violently down an incline. The plaintiff's wife saw the lorry rushing down the hill, and became frightened for the safety of her children whom she had just left. She received a nervous shock brought about by fear for her children's safety which eventually caused her death. It was held that, if these facts were proved, the plaintiff had a good cause of action under the Fatal Accidents Act, but that it would be otherwise if the shock was caused, not by what the deceased saw with her own eyes but by what she was told by bystanders of her children's peril. It was not clear how far this principle extended (g), and the view of Kennedy, J., has the support of a substantial body of authority in Scotland, and on such a subject it is important that the law should be the same in both countries. Whether the view of Kennedy, J., or of the majority of the Court of Appeal in *Hambrook v. Stokes* is to prevail was left an open question by the House of Lords in *Bourhill v. Young* (h). But in most of these cases the vital problem is the extent of the duty owed by the defendant and not the remoteness of damage (i) (k).

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(d) *Bourhill v. Young*, [1943] A. C. p. 103, per Lord Macmillan. The contrary decision of the Privy Council in *Victorian Railways Commissioners v. Coultas* (1888), 13 A. C. 222, is completely discredited, and explained by Evatt, J., in *Chester v. Municipal Council of Waverley* (1939), 62 C. L. R. 1, at pp. 46-8.

(e) [1901] 2 K. B. 669, 675.

(f) [1925] 1 K. B. 141.

(g) The Court of Appeal in *Owens v. Liverpool Corporation*, [1939] 2 K. B. 394, gave damages to some mourners who saw the hearse containing their relative's body overturned and suffered mental shock, and suggested that damages could be recovered for injury caused by shock from apprehension as to the life of a beloved dog. But that case was disapproved by Lords Thankerton, Wright and Porter in *Bourhill v. Young* on the ground that no duty was owed. See also 55 L. Q. R. 167, and Goodhart in 8 Camb. L. J. pp. 272-3.

(h) [1943] A. C. 92.

(i) *S. C.* at p. 116, per Lord Porter. Cp. *Dulieu v. White*, [1901] 2 K. B. p. 685, per Phillimore, J.: "The difficulty in these cases is to my mind not one as to the remoteness of the damage, but as to the uncertainty of there being any duty." Cp. McKerron, p. 149.

(k) On this topic generally, see Bohlen, *Studies*, 252; Pound, 28 H. L. R.



5. *Pre-natal injuries*.—No English authority decides whether damages can be recovered for injuries inflicted before birth. It was held by an Irish Court in *Walker v. Great Northern Ry. of Ireland* (l) that the plaintiff had no cause of action where her mother, while the plaintiff was *en ventre sa mère*, had been a passenger on the railway of the defendants, and was there injured in a collision caused by the defendants' negligence, and the plaintiff was subsequently and consequently born deformed. The decision, however, proceeded on the ground that the defendants owed no duty of care to a person of whose existence and presence they were unaware. In a later case (m) the Supreme Court of Canada in very similar circumstances granted a remedy. Sir John Salmond thought it difficult to see on what principle an existing but unborn child should be deprived of the protection of the law against wilful or negligent injuries inflicted upon it (n). It is more difficult to see how the duty to take care owed to the plaintiff, which is a pre-requisite of an action in negligence, can be owed to a non-existent person than it is to understand that wilful injury can be actionable if inflicted upon a child yet unborn (o). But it is submitted that the real question is: Has a living plaintiff a right not to have been injured by acts done before his birth? Once such acts have been established to be tortious there seems no reason why this head of damage should not be recognised, whether the wrong be done to his person, his reputation or his property (p).

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pp. 359-62, Harvard Essays, pp. 103-6; Throckmorton 34 H. L. R. 260, Harvard Essays, 303; Pound, Interpretations, pp. 120-2; Hughes Parry, 41 L. Q. R. 297; Magruder, 49 H. L. R. 1033.

(l) (1891), 28 L. R. Ir. 69.

(m) *Montreal Tramways v. Leveille* (1933), 4 D. L. R. 337.

(n) Cp. *per* Lord Macmillan in *Elliot v. Joicey*, [1935] A. C. pp. 238-41.

(o) So the American Restatement (s. 869) denies a right of action where it is based on negligence, but leaves open the question where the harm is committed intentionally or recklessly.

(p) For a full discussion see Winfield's article on "The Unborn Child", 8 Camb. L. J. 76, 4 Toronto L. J. 278, where there is an invaluable bibliography of the subject.

## CHAPTER XII

INJURIES TO DOMESTIC AND CONTRACTUAL  
RELATIONS

## § 92. Death

In this chapter we shall consider those tortious acts which are an injury neither to the person, nor reputation nor property but are based on a wrongful interference with a man's relations to others, for example, his wife, his children or those with whom he holds a contract. For a man may be damnified by the death of another person, by the loss of his wife's *consortium*, by the seduction of his daughter, by the deprivation of the work of his servants or by the non-fulfilment of contractual obligations due to him from another.

1. *Causing death not a civil wrong at common law.*—At common law it was not a civil wrong to cause the death of a human being. Lord Ellenborough in 1808 in *Baker v. Bolton* (a) said: "In a civil court the death of a human being cannot be complained of as an injury". Until the passing of the Law Reform (Miscellaneous Provisions) Act in 1934 (b) the wrong done to the deceased himself by the taking away of his life died with him, in accordance with the maxim *Actio personalis moritur cum persona*; and neither the mental suffering nor the material loss inflicted upon his family or upon other persons having an interest in his life was regarded by the common law as any ground of action (c). Although a husband can sue at common law for any wilful or negligent harm done to his wife, whereby he is temporarily deprived of her society or services, he cannot sue in respect of that permanent deprivation which he suffers by reason of her death (d). A father's rights in respect of his children are similarly limited. Thus, in *Osborn v.*

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(a) 1 Camp. 498.

(b) *Supra*, s. 20 (2).

(c) *Osborn v. Gillett* (1879), L. R. 8 Ex. 88; *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648; *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38. On this rule, see Holdsworth in 32 L. Q. R. 431; 33 L. Q. R. 107-9; Holdsworth, H. E. L. (3rd ed.), iii, 331-6, 676-7; Winfield in 29 Col. L. R. 239-41, 250-4, and in 44 L. Q. R. 298; Walton in J. C. L. (3rd series), xviii, 40; Report of Law Revision Committee (1934, Cmd. 4540).

(d) *Baker v. Bolton* (1808), 1 Camp. 498.

*Gillett* (e) a father sued at common law for the death of his daughter, who had been negligently run over and killed by the defendant. The defendant pleaded that the deceased had been killed on the spot, and therefore that the plaintiff had not been deprived of the services of his daughter otherwise than by her death; and it was held by the Court of Exchequer that the plea was good. Had the death ensued after an interval only, the plaintiff would have had a good cause of action for loss of service during that interval, but none in respect of the death.

We have already seen (f) that the Law Reform (Miscellaneous Provisions) Act, 1934, abolished the effect of the maxim *actio personalis moritur cum persona*. But that rule is entirely distinct from the rule which deprives other persons than the deceased of any remedy where they have suffered damages as the result of the death. The latter rule seems to be based in so far as it refers to inability to recover for the loss of services by the infliction of death on the principle that a trespass is merged in a felony, a reason inadequate in Lord Ellenborough's time, and now obsolete (g). "In so far as the rule is of general application, and not limited to the killing of a servant, we can only conjecture what basis it had" (h). It is probable that it was introduced into the law owing to a confusion of the *actio personalis* maxim, with the principle that no action will lie for a tort which is also a felony till the felon has been prosecuted, a principle which will not support the rule in its present wide form (i). "If the rule is really based on the relevant death being due to felony", said Lord Atkin (k), "it should long ago have been relegated to a museum, for deaths by negligence are often not felonious, and where they happen more than a year and a day after the wrongful act cannot be."

*Except in breach of contract.*—In *Jackson v. Watson and Sons* (l), however, it was decided by the Court of Appeal that this rule does not apply in an action for breach of contract, but is limited to cases of pure tort. Where the breach of a contract made with

(e) (1873), L. R. 8 Ex. 88. It does not appear from the report of this case why the action was not brought under the Fatal Accidents Act. Under this Act damages could in such a case be recovered to the extent of the value of the daughter's gratuitous services to her father: *Berry v. Humm & Co.*, [1915] 1 K. B. 627.

(f) *Supra*, s. 20 (2).

(g) *Cp. supra*, s. 39 (3). In any event the civil remedy is only suspended, not extinguished: *Rose v. Ford*, [1937] A. C. p. 846.

(h) Winfield in 29 Col. L. R. p. 263.

(i) Holdsworth in H. E. L. (3rd ed.), iii, p. 335.

(k) *Rose v. Ford*, [1937] A. C. p. 834. *Cp. Lord Wright at p. 847.*

(l) [1909] 2 K. B. 193.

the plaintiff results in the death of some third person in whose life the plaintiff has an interest, the damages recoverable in an action of contract will, it seems, include any pecuniary loss resulting, not too remotely, from that death. Thus, in the last cited case, a husband, in an action for breach of warranty in a contract of sale, recovered damages (independently of the Fatal Accidents Act) for the death of his wife caused by eating certain poisonous food sold to him by the defendants. In other words, the killing of a human being, although not itself a cause of action, may be taken into account in assessing damages for an independent cause of action in contract (*m*).

The result is anomalous. A woman travelling in a motor coach is so injured as the result of the driver's negligence that she dies. If the woman bought the ticket herself, her husband has no claim, unless he has one under Lord Campbell's Act, because it would be a mere claim in tort and would fall within the rule. If, however, the husband bought his wife a ticket he can claim in contract for medical expenses, etc., as well as for loss of service (*n*).

Sir William Holdsworth has said (*o*): "The rule as laid down by Lord Ellenborough (*p*) is obviously unjust; it is technically unsound because . . . it is based upon a misreading of legal history; and yet it is the law of England to-day, for it was upheld by the House of Lords in 1917 in the case of *The Amerika* (*q*). . . . We can only regard the decision as perhaps the strongest illustration which we have in our books of the manner in which *communis error* sometimes *facit jus*."

The Law Revision Committee in 1934 recommended the abolition of the rule in *Baker v. Bolton* (*r*), but the Law Reform (Miscellaneous Provisions) Act, 1934, did not give effect to their recommendation.

2. *Shortened expectation of life*.—After it had been held in *Flint v. Lovell* (*s*) that to grant compensation for the loss of expectation of life did not infringe the rule in *Baker v. Bolton* (*t*) and such compensation had been recognised as a separate head of damage, it was contended that the rule in *Baker v. Bolton* none the less

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(*m*) *Baker v. Bolton* (1808), 1 Camp. 493, is distinguished as being in *form* an action of tort, although the act of the defendant was also a breach of contract.

(*n*) Report of Law Revision Committee (1934, Cmd. 4540).

(*o*) H. E. L., iii, pp. 386, 677.

(*p*) *Baker v. Bolton* (1808), 1 Camp. 493.

(*q*) [1917] A. C. 38.

(*r*) Cmd. 4540, s. 15 (*e*).

(*s*) [1935] 1 K. B. 354.

(*t*) (1808), 1 Camp. 493.

prevented such damages being recovered when death had followed. The Court of Appeal in *Rose v. Ford* (u) accepted this contention and held by a majority that the personal representatives cannot recover damages under the Law Reform (Miscellaneous Provisions) Act, 1934 (x), for the deceased's shortened expectation of life. The right of action was merged in the felony. The House of Lords (y) reversed this decision and upheld the dissenting judgment of Greer, L.J. (z). "This illogical doctrine of *The Amerika*" (a) is not to be extended. In such a case the right of action for diminished expectation of life was vested in the deceased. The fact that he died before judgment is irrelevant save that it obviates to some extent the necessity of proving the gravity of the injuries or that the accident shortened his life. The action is not for the death itself (b).

3. *Statutory exceptions. The Fatal Accidents Acts.*—The rule that no man has any legally protected interest in the life of another has been to a great extent derogated from by statute, but it still remains the general principle, the Fatal Accidents Act, 1846, otherwise known as Lord Campbell's Act, having merely established special exceptions to it. Under that Act it is a civil wrong, actionable by or on behalf of the near relatives of the deceased, to cause the death of a human being, if the deceased himself would have had a right of action had he been merely injured and not killed, and if those relatives have suffered a pecuniary loss in consequence of his death (c).

4. *What relatives entitled.*—The relatives whose interests are thus protected are by section 5 the following: Husband, wife, children, grandchildren, stepchildren, father, mother, step-parents, and grandparents. Illegitimate and adopted children by s. 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, are for the

(u) [1936] 1 K. B. 90.

(x) *Vide supra*, s. 20 (3).

(y) [1937] A. C. 826, pp. 834, 839, 845-6, 856-7.

(z) [1936] 1 K. B. pp. 97 *sqq.* His dissenting judgment was preferred in the 9th edition of this work, p. 363.

(a) [1917] A. C. 38.

(b) *Cp. Morgan v. Scoulding*, [1938] 1 K. B. p. 789, *per* Lewis, J. For the method of assessing such damages *vide supra*, s. 91 (3).

(c) In New Zealand it has been held that an action will lie if the deceased committed suicide as a result of insanity caused by the defendant's negligence, provided that insanity was such as to absolve him of a criminal act: *Murdoch v. British Israel Federation*, [1942] N. Z. L. R. 600. In England it seems that the action would lie even if the insanity did not satisfy the rules necessary to relieve from criminal responsibility: see 59 L. Q. R. 202.

purposes of the Acts to be deemed to be children, and posthumous children come under the Act (*d*).

5. *Limitation of action*.—The action must be brought within twelve months (or, in the case of loss of life by collision at sea, within two years) after the death by the executor or administrator of the deceased on behalf of the relatives; but if there is no executor or administrator, or if he does not commence an action within six months, any relative entitled to the protection of the Act may sue in his own name on behalf of himself and the others (*e*).

6. *Apportionment of damages*.—The amount recovered is divisible among the relatives in the proportions fixed by the jury, having regard to the loss suffered by each of them (*f*). If the claim is settled without action, the shares of the relatives may be determined by the Court in proceedings instituted for that purpose (*g*).

7. *Damages not part of deceased's estate*.—The amount recovered is not part of the estate of the deceased so as to be liable for his debts. The executor or administrator recovers it, not in his ordinary capacity as the personal representative of the deceased, but in a special capacity in right of the relatives (*h*).

8. *Action by relatives is dependent on existence of cause of action vested in deceased himself*.—There is no right of action unless the deceased himself could have sued had he been merely injured by the defendant's act and not killed. Therefore, if he has in his lifetime, in the interval between the accident and his death, accepted full compensation from the defendant, and so extinguished his right of action, his relatives cannot sue in respect of his death (*i*). The same result follows if he has been guilty of contributory negligence (*k*), or if he agreed to take the risk of the accident on himself so as to exclude any right of action in accordance with the maxim

(*d*) *The George and Richard* (1871), L. R. 3 A. & E. 466.

(*e*) Fatal Accidents Act, 1846, s. 3, as amended by Fatal Accidents Act, 1864, s. 1; Maritime Conventions Act, 1911, s. 8; *The Caliph*, [1912] P. 213. The relatives may sue even within the six months if there is no executor or administrator; *Holleran v. Bagnell* (1879), 4 L. R. Ir. 740.

(*f*) Fatal Accidents Act, 1846, s. 2. See Fatal Accidents Act, 1864, s. 2.

(*g*) *Bulmer v. Bulmer* (1884), 25 Ch. D. 409.

(*h*) Cp. *supra*, s. 20 (6), n. (g), and see also *Marginson v. Blackburn B. C.*, [1939] 2 K. B. 426.

(*i*) *Read v. Gt. Eastern Ry.* (1868), L. R. 3 Q. B. 555. But see s. 35 (11), *supra*.

(*k*) *Senior v. Ward* (1859), 1 E. & E. 385; *Vincent v. Southern Ry.*, [1927] A. C. 430.

*Volenti non fit injuria* (l), or if at the time of his death the Statute of Limitation has already run against him (m).

Nevertheless the cause of action conferred upon the relatives of the deceased by the Act is a new cause of action, and not merely a continuance of that which was formerly vested in the deceased himself. It is "new in its species, new in its quality, new in its principle, in every way new" (n). The measure of damages may be entirely different: the deceased, if alive, could only have recovered damages for his personal injuries; the relatives recover substantially for the loss of their breadwinner. So, if the deceased has merely agreed to limit the amount of the liability of the defendant, his relatives will not be limited in the amount they may recover by that agreement. The deceased can bar his dependants entirely of their remedy, but he cannot bar them in part (o). So again if the period of limitation under the Statute of Limitation was not complete as against the deceased at the date of his death, it cannot be completed afterwards, so as to bar the claim of the relatives under the Act. This claim is subject to its own period of limitation as fixed by the Act itself and commencing on the death of the deceased, and is not subject to the Statute of Limitation affecting the claim of the deceased himself (p). So if the deceased died nine months after the accident the action can be brought against a public authority (q) on behalf of the dependants at any time within the next twelve months, even though his own claim might have been barred after one year from the date of the accident (r).

9. *No compensation without pecuniary loss.*—There is no right of action on behalf of any relative who cannot show some pecuniary loss in consequence of the death of the deceased (s). Nothing can be claimed merely by way of *solatium* for the mental suffering and bereavement, nor is there any action for nominal damages in the

(l) *Griffiths v. Earl of Dudley* (1882), 9 Q. B. D. 357.

(m) *Williams v. Mersey Docks & Harbour Board*, [1905] 1 K. B. 804; *British Columbia Electric Ry. v. Gentile*, [1914] A. C. p. 1042. So also an admission by the deceased as to the cause of the accident which resulted in his death can be given in evidence to defeat a claim by his dependants: *Marks v. Portsmouth Corporation* (1937), 157 L. T. 261.

(n) *The Vera Cruz* (1884), 10 A. C. p. 70.

(o) *Nunan v. Southern Ry.*, [1924] 1 K. B. 223; *Grein v. Imperial Airways*, [1937] 1 K. B. 50.

(p) *British Columbia Electric Ry. v. Gentile*, [1914] A. C. 1034, overruling *Markey v. Tolworth Hospital District Board*, [1900] 2 Q. B. 454. See also *Venn v. Tedesco*, [1926] 2 K. B. 227, where McCardie, J., reviewed all the authorities.

(q) *Vide supra*, s. 38 (2).

(r) *Underhill*, p. 400. Winfield, p. 709, seems wrong on this.

(s) *Blake v. Midland Ry.* (1852), 18 Q. B. 93.

absence of proof of actual loss (t). There is, however, a sufficient pecuniary loss if the claimant can show some reasonable expectation of pecuniary benefit from the continuance of the deceased's life (u); and it is not necessary that the benefit should be derived from the deceased as a matter of right, for a reasonable expectation of voluntary bounty is enough (w). Thus a working man can recover damages for the death of his wife in respect of the loss of the pecuniary value of her domestic services (x). Nor is it necessary that any benefit should have been actually received from the deceased during his lifetime (y). The benefit must be derivable, however, from the claimant's relationship to the deceased, and not merely from a contract between them (z). A merely speculative possibility of pecuniary benefit is not enough (a). Where the dependant himself dies subsequently to the death of the person in respect of whose death the action is brought but before judgment, the shortness of his tenure of life before dependence was terminated must be taken into account in determining the amount to be awarded (b). Funeral expenses may be recovered if they have been incurred by the parties for whose benefit the action is brought (c).

10. *Pecuniary benefit to relatives from death of deceased.*—Conversely any pecuniary benefit or reasonable expectation of pecuniary benefit to the relatives from the death of the deceased must be taken into account in reduction of damages, which "are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death" (d). Thus, in *Pym v. Great Northern Ry.* (e) the benefits which a wife and children took under a settlement upon the death of the husband were so taken

(t) *Duckworth v. Johnson* (1860), 29 L. J. Ex. 25; *Royal Trust Co. v. C. P. R. Co.* (1922), 38 T. L. R. 899.

(u) *Taff Vale Ry. v. Jenkins*, [1913] A. C. 1; *Baker v. Dalgleish Steam Shipping Co.*, [1922] 1 K. B. 361.

(w) *Franklin v. S. E. Ry.* (1858), 3 H. & N. 211.

(x) *Berry v. Humm & Co.*, [1915] 1 K. B. 627.

(y) *Taff Vale Ry. v. Jenkins*, [1913] A. C. 1.

(z) *Sykes v. N. E. Ry.* (1875), 44 L. J. C. P. 191.

(a) *Barnett v. Cohen*, [1921] 2 K. B. 461.

(b) *Williamson v. Thornycroft & Co.*, [1940] 2 K. B. 658. In *Hall v. Wilson* (1939), 4 A. E. R. 85, Oliver, J., reduced the amount because of the additional risk that the deceased might have been killed whilst fighting or in an air-raid.

(c) Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (3). As to the nature of the loss which is required to give a good cause of action, see the following cases in addition to those already cited: *Stimpson v. Wood* (1888), 57 L. J. Q. B. 484; *Hetherington v. N. E. Ry.* (1882), 9 Q. B. D. 160.

(d) Per Lord Porter in *Davies v. Powell Duffryn Collieries*, [1942] A. C. p. 623.

(e) (1863), 4 B. & S. 396.



into account. So where the relatives are also entitled either under a will or on intestacy to a share of the deceased's estate any damages given under the Law Reform (Miscellaneous Provisions) Act, 1934 (f), will go in reduction of the amount awarded to them under the Fatal Accidents Acts. Nor can an employer be made liable to pay compensation to the same person both under the Fatal Accidents Acts and the Workmen's Compensation Act, 1925 (g). Again in *Baker v. Dalgleish Steam Shipping Co.* (h) the fact that the widow was in consequence of her husband's death in receipt of a pension was taken into account, notwithstanding the circumstance that the pension was dependent on the voluntary bounty of the Crown (i). This still remains the general rule as regards pensions (k), though by the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 40, pensions payable under that Act are not to be taken into account. A statutory exception to the general rule has been established in the case of life insurance. By the Fatal Accidents (Damages) Act, 1908, it is provided that in assessing damages "there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance".

11. It will be seen that the remedy under the Fatal Accidents Act fell far short of giving to the dependants or to the estate of the deceased the same cause of action which had vested in the deceased before the death. The consequent injustice which limited the liability of a wrongdoer who had, by his wrongdoing, killed another person to something very much less than his liability would have been if he had only maimed the injured person was one of the reasons which led to the passing of the Law Reform (Miscellaneous Provisions) Act, 1934 (l).

12. *Felonious killing*.—The fact that the killing of the deceased amounted to the felony of murder or manslaughter does not exclude or even suspend the remedy by action (m).

13. *Carriage by Air*.—In the case of international carriage (n)

(f) *Vide supra*, s. 20 (6).

(g) S. 29. See *London Brick Co. v. Robinson*, [1943] A. C. 341.

(h) [1922] 1 K. B. 361.

(i) See also *Royal Trust Co. v. C. P. R. Co.* (1922), 38 T. L. R. 899.

(k) *Lory v. G. W. Ry.*, [1942] 1 A. E. R. 230.

(l) *Per Greer, L.J.*, in *Rose v. Ford*, [1936] 1 K. B. p. 98.

(m) Fatal Accidents Act, 1846, s. 1.

(n) "International carriage" is defined by the First Schedule, art. 1 (2) of the Carriage by Air Act, 1932. See also *Grein v. Imperial Airways*, [1937] 1 K. B. 60.

by air the right to proceed under Lord Campbell's Act is done away with, and the amount of damages where there is no special contract is limited to 125,000 francs for each passenger. This is provided by the Carriage by Air Act, 1932 (o), which made the carrier liable for damage sustained in the event of the death of a passenger if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

14. *Concurrent rights of action*.—Subject to what has been said above (p), where the deceased himself has a cause of action which survives him, his personal representative has a double right of action; he can sue both on behalf of the deceased's estate and also on behalf of the relatives (q).

### § 93. Parent and Child

1. *Rights of a parent as such*.—No parent has, as such, any right in respect of his child of such sort that an action for damages will lie against any other person for a violation of that right (qq). The only right which a parent has as such is a right to the possession and custody of his child during minority. The remedy for the infringement of this right is not an action for damages against the person who deprives him of his child (r), but the recovery of possession either by means of a writ of *habeas corpus* or by an application to the Chancery Division to exercise its power in respect of the guardianship of infants (s).

2. *Rights of a parent as a master*.—All rights of action vested in a parent in respect of his child are vested in him not in his capacity as a parent, but in his capacity as the master of his child, and are therefore dependent upon the existence in the particular case of the relation of master and servant. If this relation does

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(o) First Schedule, arts. 17, 22.

(p) S. 92 (10).

(q) Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (5).

(qq) *Hall v. Hollander* (1825), 4 B. & C. 660.

(r) *Barham v. Dennis* (1598), Cro. Eliz. 769.

(s) It is true, indeed, that an action of trespass would formerly lie at the suit of the father for the taking away of his son and heir, but it was decided in *Barham v. Dennis*, *ubi supra*, that this remedy did not extend to the taking away of his other children, and that the ground of the action even in the case of the son and heir was the valuable interest which the father had in the marriage of the child under the old system of tenure in chivalry. See Bl. Comm. III, 140. In *Hall v. Hollander* (1825), 4 B. & C. p. 660, Holyrold, J., says: "It is clear that in cases of taking away a son or daughter, except for taking a son and heir, no action lies unless a loss of service is sustained." See Holdsworth, H. E. L., viii, 427-8.

not exist, either because the child is too young to give any services, or because he is in the service of some other person, or for any other reason, the father has no remedy for any wrong done to him in respect of his child. Thus, in *Hall v. Hollander* (t) a father sued for the negligence of the defendant in causing physical harm to his child aged two years and a half, and was held to have no cause of action because the child was too young to afford any services to him, and therefore the relation of master and servant could not and did not exist between them. Similarly, in the absence of this relation a father has no right of action for the seduction of his daughter, and this is so even although, by reason of the resulting pregnancy and child-birth, he has necessarily incurred pecuniary loss. "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed from the earliest time hitherto not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest" (u).

8. *Liability of father based on same principle.*—We have already seen that the *liability* of a father for the wrongful acts of his child depends on the same principle. He is responsible for his children not as being their father, but, if they are in his employment, as being their employer (v).

### § 94. Master and Servant: Seduction

1. *Seduction of servant a wrong to the master.*—It is a tort actionable at the suit of a master to seduce or, *a fortiori*, to rape (w) his female servant and thereby to deprive him of her services. The right of a master to the services of his servant is one which the law protects not merely as against the servant himself, but also as against third persons, just as a similar protection is extended to the right of a husband to the *consortium et servitium* of his wife. And just as this latter right is violated by adultery, so the master's right is violated by the seduction of a female servant.

(t) (1825), 4 B. & C. 660. The Court, however, left it an open question whether in such a case the father could recover medical expenses which he had necessarily incurred. In insurance practice such claims are not challenged.

(u) *Grinnell v. Wells* (1844), 7 M. & G. p. 1041; *Peters v. Jones*, [1914] 2 K. B. 781.

(v) *Supra*, s. 15 (6). The right of a parent to recover damages for the death of his child has been already considered. *Supra*, s. 92.

(w) *Mattouk v. Massad*, [1943] A. C. 688.

2. *Loss of service necessary.*—Seduction is not, however, actionable *per se*, but only when it results in an actual loss of service. To use the technical terms of the older pleading, the cause of action must be laid with a *per quod servitium amisit*. The usual cause of this loss of service is pregnancy and child-birth; but this is not essential, for any loss of service is enough if it results from the seduction in any manner not too remote—*e.g.*, illness due to mental agitation after seduction and desertion (x). If a child is born which is not the child of the defendant (y), or if the servant seduced leaves the plaintiff's service for some other reason before her pregnancy has caused any loss of service (z), there is no cause of action.

3. *Seduction prior to service.*—Even loss of service is not a cause of action if the seduction happened before the relation of master and servant came into existence; for the act of the defendant was not in that case the violation of any existing right vested in the plaintiff (a).

4. *Measure of damages.*—The damages in this action are not necessarily limited to the value of the services lost. They include all expenses necessarily or properly incurred by the master in respect of his servant's illness and the birth of her child. And when the relation between the master and servant is such that her seduction is an injury to his honour and feelings, and not merely to his purse, vindictive damages are rightly given: as, for example, when the master is also the father or mother of the person seduced, or some one standing *in loco parentis*, such as an adoptive parent or a relative with whom she lives (b), but not, it seems, if the child was illegitimate. The damages will only be substantial if the seduction is a blow to the pride and sense of honour of happily and legally married people (c). The damages may be aggravated if the seducer has made his advances under the guise of matrimony. But in such a case the jury must not include any damages in compensation for breach of promise of marriage; for such damages belong to the woman and not to her employer. But the cost of maintenance of any child that may be born, even though it is not

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(x) *Manvell v. Thomson* (1826), 2 C. & P. 303.

(y) *Eager v. Grimwood* (1847), 1 Ex. 61.

(z) *Hedges v. Tagg* (1872), L. R. 7 Ex. 283.

(a) *Davies v. Williams* (1847), 10 Q. B. 725; *Hamilton v. Long*, [1903] 2 I. R. 407; [1905] 2 I. R. 552.

(b) *Irwin v. Dearman* (1809), 11 East 23.

(c) *Beetham v. James*, [1937] 1 K. B. 527, p. 533, *per Atkinson J.* *Sed quare?*

a legal obligation on the plaintiff to maintain it, may be taken into account by the jury (d). On the other hand the measure of damages may be affected by the character and conduct of the girl. General levity of character and even her improper conduct or conversation may be proved in mitigation of damages (e). It is also a mitigation that the plaintiff has himself conducted to the wrong by his own negligence as a guardian (f). In all such cases, indeed, the action, though in form and in law based on the loss of service, is in substance and in fact based on the injury to the honour and feelings of the parent or other relative of the person seduced. The loss of service is simply the necessary condition which must exist before any claim for such *solatium* can be entertained. It is greatly to be desired, therefore, that the law should be put on a more rational basis, and that the real cause of action should receive legal recognition instead of being made available by means of a device which is little better than a legal fiction (g).

5. It is not necessary that the defendant should have had any knowledge that the person seduced was the servant of the plaintiff (h).

6. *Kinds of service*.—For the purpose of an action for seduction service is of three kinds, any one of which is sufficient—viz., (a) contractual service, (b) *de facto* service, and (c) constructive service.

7. *Contractual service*.—Contractual service is that which is rendered under a binding contract for wages or other valuable consideration and either for a fixed term or at will. This is the ordinary case of master and servant, and may, though it seldom does, exist also between a parent or other person *in loco parentis* and a daughter.

8. *De facto service*.—*De facto* service is service rendered in fact, but not under any binding contract of service. This is the ordinary relation which exists between a father or other person *in loco*

(d) *Flynn v. Connell*, [1919] 2 Ir. R. 427.

(e) *Verry v. Watkins* (1836), 7 C. & P. 308. See Winfield, p. 260, n. (p).

(f) *Reddie v. Scoolt* (1795), Peake 316.

(g) Most actions for seduction are brought by parents or other persons *in loco parentis*. The action, however, lies equally at the suit of an ordinary master: *Fores v. Wilson* (1791), 1 Peake 77; *Mackenzie v. Hardinge* (1907), 23 T. L. R. 15. On the history of the action, see Miles in Dig. pp. 432-3; Holdsworth, H. E. L., viii, 428-9; Pollock, 182, n. (o). The law has been altered by legislation in Canada: see *Brownlee v. MacMillan*, [1940] A. C. 802.

(h) *Fores v. Wilson* (1791), 1 Peake 77.

*parentis* and a daughter who resides with him. If service is in fact habitually rendered by a daughter to her parent, there exists between them a sufficient *de facto* relation of master and servant to found an action for loss of service by seduction; and it makes no difference that the service so rendered may be quite trivial in value or nature. The slightest habitual participation in domestic affairs is sufficient for this purpose. "Even making tea has been said to be an act of service" (i).

9. *Constructive service*.—Constructive service is that which exists in the eye of the law when there is a legal right to service, though none in fact. Thus, a father is deemed for this purpose to have a legal right to the services of his children who are minors, unmarried (if daughters), and not engaged by contract to serve some other person exclusively. This right of service amounts to constructive service, and is therefore sufficient to ground an action for seduction or for any other violation of the rights of a master, provided that the two following conditions are fulfilled :—

- (a) The child must be old enough to be capable of performing acts of service (k);
- (b) The child must be either resident in the father's house or must be merely temporarily absent from it with the *animus revertendi*.

If these two conditions are fulfilled, it is not necessary in an action for seduction or other violation of a master's rights to prove any actual service, whether contractual or *de facto*, for the law will conclusively presume that service exists. Thus, in *Terry v. Hutchinson* (l) the plaintiff's daughter under the age of twenty-one, being in the domestic service of another person, left that service with the intention of returning to her father's house, and in the course of her homeward journey was seduced by the defendant; and it was held that her father had a good cause of action.

(i) *Carr v. Clarke* (1818), 2 Chit. 260. Cp. *Manvell v. Thomson* (1826), 2 C. & P. p. 304; *Bennett v. Allcott* (1787), 2 T. R. 168. The relation of *de facto* service is not excluded or terminated by temporary absence, if the *animus revertendi* still exists: *Griffiths v. Teetgen* (1854), 15 C. P. 344. When a daughter lives with her father and mother and renders domestic service in the ordinary way, this *de facto* service is with the father exclusively, and not with the mother, and the mother has no cause of action: *Peters v. Jones*, [1914] 2 K. B. 781; *Beetham v. James*, [1937] 1 K. B. 527.

(k) *Hall v. Hollander* (1825), 4 B. & C. 660.

(l) (1868), L. R. 3 Q. B. 599.

Cockburn, C.J., said (m): "I think there was enough to amount to a constructive service. . . . What is the difference, if the father had the right to the service, that he has not actually exercised that right?"

If, however, the daughter is of full age, there is no constructive service, and the father must prove either *de facto* or contractual service. And even in the case of minors constructive service is excluded by permanent absence from the father's house with no *animus revertendi* (n).

10. *Concurrent service with two masters.*—A servant may at the same time be in the service of two different masters, and in this case each of them will have a right of action for her seduction (o). Accordingly, in *Ogden v. Lancashire* (p), a father was held entitled to sue for the seduction of his daughter who lived with him and rendered him *de facto* service, notwithstanding the fact that she was engaged during the working hours of each day in the contractual service of a millowner. In the case of children under age constructive service is on the same principle sufficient, although concurrent with contractual service to a third person during working hours (q).

When, on the other hand, the daughter habitually resides not with her father, but with her employer, to whom she owes exclusive contractual service, no *de facto* or constructive service to her father is sufficient to give him any cause of action. Thus in *Hedges v. Tagg* (r) a daughter engaged as a governess came back to her mother's house for a holiday of three days, and did acts of domestic service; and although she was seduced while thus at home her mother was held to have no cause of action. The concurrent contractual service with her employer was inconsistent with and excluded the *de facto* service with her mother. In these cases it makes no difference whether the parent's claim is based on *de facto* or merely on constructive service (s).

(m) (1868), L. R. 3 Q. B. p. 601. Cp. *Mellor, J.*, at p. 603. See also *Peters v. Jones*, [1914] 2 K. B. 781, p. 786, *Maunders v. Venn* (1829), Mood. & M. p. 323, and *Jones v. Brown*, 1 Peake 306, in which constructive service was held sufficient to found an action by a father for an assault upon his son under age.

(n) *Dean v. Peel* (1804), 5 East 45.

(o) *Thompson v. Ross* (1860), 29 L. J. Ex. p. 3, *per* Bramwell, B.

(p) (1866), 15 W. R. 158. Cp. *Rist v. Faux* (1863), 4 B. & S. 409.

(q) *Dent v. Maguire*, [1917] 2 Ir. R. 59.

(r) (1872), L. R. 7 Ex. 283. Cp. *Whitbourne v. Williams*, [1901] 2 K. B. 722 (acts of household service on weekly half-holidays).

(s) See *Carr v. Clarke* (1818), 2 Chit. 260; *Blaymire v. Haley* (1840), 6 M. & W. 55; *Thompson v. Ross* (1860), 5 H. & N. 16.

## § 95. Master and Servant: Loss of Service

1. It is a tort actionable at the suit of a master to take away, imprison, or cause bodily harm to his servant, if (a) the act is a tort as against the servant (*t*), and (b) the master is thereby deprived of his servant's services (*u*).

2. For the purpose of this rule the relation of master and servant is governed by the same principles as those already explained in the case of seduction. The service may be either contractual, *de facto*, or constructive; and the plaintiff may be either an employer in the ordinary sense, or a parent or other person *in loco parentis* suing in respect of services (however trivial) which he receives or is entitled to receive from a child. Thus in *Jones v. Brown* (*w*) a father sued for the loss of the constructive services of his son, who had been assaulted by the defendant. Again in *Berringer v. Great Eastern Ry.* (*x*) a father recovered damages from a railway company for physical harm done to his son, who was in his *de facto* service (*y*).

3. *Inducing servant to leave his employment.*—In the absence of lawful justification it is a tort actionable at the suit of a master to induce his servant to leave his employment wrongfully or to induce him by illegal means, such as fraud or intimidation, to leave his employment even rightfully.

4. For the purpose of this rule the relation of master and servant is governed by the rules already explained in the case of seduction. So that it is actionable under this rule to induce a child under age but capable of service to leave his father against the latter's will, unless there is some lawful justification (*z*) (a) (b).

(*t*) This is, of course, not the case in seduction.

(*u*) *Martinez v. Gerber* (1841), 3 M. & G. 88; *Berringer v. Gt. E. Ry.* (1879), 4 C. P. D. 163; *Osborn v. Gillett* (1878), L. R. 8 Ex. 88; *Bradford Corporation v. Webster*, [1920] 2 K. B. 135; *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209.

(*w*) (1794), 1 Penke 306.

(*x*) (1879), 4 C. P. D. 163. And see *Gilbert v. Schwenck* (1845), 14 M. & W. 488.

(*y*) The fact that the wrong done to the servant is not merely a tort, but also a breach of a contract made with him, does not exclude or in any way affect the master's right of action for loss of service. The decision to the contrary in *Alton v. Midland Ry.* (1865), 19 C. B. (n.s.) 213, turned merely upon a point of pleading. See *Meuz v. Gt. E. Ry.*, [1895] 2 Q. B. 387, at pp. 391, 394.

(*z*) *Evans v. Walton* (1867), L. R. 2 C. P. 615.

(a) In the case of *Speight v. Olivier* (1819), 2 Stark. 493, it was held that to induce a daughter of full age to leave her father's house by means of a fraudulent pretence of engaging her as a domestic servant, the real intention being to seduce her, was a tort actionable at the suit of her father. This must be taken as an application of the present rule, and not of that as to seduction.

(b) In more than one case the act of engaging a servant who is known to have



5. When no illegal means of inducement or coercion are used by the defendant, it is not a tort to induce a servant to leave his master's service, unless the act of the servant in doing so is wrongful. Therefore, to persuade a servant to leave a merely *de facto* service (c) or to terminate a contractual service by due notice is not actionable.

### § 96. Inducement of Breach of Contract (d)

1. *Inducing a breach of contract is a tort.*—In *Lumley v. Gye* (e) the rule as regards enticing of a servant was applied to a case in which the employment was not of that nature, and it is now established by the House of Lords in *Quinn v. Leatham* (f) and *South Wales Miners' Federation v. Glamorgan Coal Co.* (g) that intentionally and without lawful justification to induce or procure any one to break a contract made by him with another is a tort actionable at the suit of that other, if damage has resulted to him (h). This is an enormous extension of the older law (i), and the rule is really an illustration of a wider principle that "a violation of legal right committed knowingly is a cause of action. . . . It is a violation of legal right to interfere with contractual

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left his master wrongfully, or of continuing to employ such a servant after knowledge of the facts, has been held actionable at the suit of the former master: *Blake v. Lanyon* (1795), 6 T. R. 221; *Wilkins v. Weaver* (1915), 84 L. J. Ch. 929. See also Holdsworth, H. E. L., iv, 384, n. 8. Damages, not an injunction, is the proper remedy: *Rely-A-Bell Burglar and Fire Alarm Co. v. Eisler*, [1926] Ch. 609. In *De Francesco v. Barnum* (1890), 63 L. T. 514, Fry, L.J., held that the action for harbouring after notice would lie even where the relationship was not strictly one of master and servant. Cp. *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 810. Shearman, J., refused to follow these decisions, confining the application of this rule to cases of master and servant. Otherwise it would enable "a man who had been engaged to a lady who had jilted him to sue another person who had married her": *Long v. Smithson* (1918), 118 L. T. 678. But see *Lauterpacht* in 52 L. Q. R. p. 520, n. 10.

(c) *De Francesco v. Barnum* (1890), 45 Ch. D. 430. This limitation is perhaps (as Sir John Salmond thought) to be taken to be implied in the judgments in *Evans v. Walton* (1867), L. R. 2 C. P. 615, although it is not expressed. But an action lay for enticing from *de facto* service under a voidable contract in *Keane v. Boycott* (1795), 2 H. Bl. 512; and cp. *Sykes v. Dixon* (1839), 9 A. & E. 698, and *Dixon v. Dixon*, [1904] 1 Ch. 161. See also Cl. & L. 241-2.

(d) On this subject see *Lauterpacht*, 52 L. Q. R. 494 *sqq.*, and, from an American point of view, *Carpenter*, "Interference with Contract Relations", 41 H. L. R. 728 *sqq.*

(e) (1853), 2 E. & B. 216.

(f) [1901] A. C. 495.

(g) [1905] A. C. 239. See also *Bowen v. Hall* (1881), 6 Q. B. D. 339; *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. 732; *National Phonograph Co. v. Edison Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335.

(h) As to proof of damage in such cases, see *Exchange Telegraph Co. v. Gregory & Co.*, [1895] 1 Q. B. 147; *Goldsoil v. Goldman*, [1914] 2 Ch. 603; *British Industrial Plastics v. Ferguson* (1938), 160 L. T. pp. 98-9.

(i) For the historical origin, see Holdsworth, H. E. L., iv, pp. 383-5; viii, 448.

relations recognised by law, if there be not sufficient justification for the interference" (k).

The rule is no longer confined to inducements to break contracts of service (l), but no action will lie for the inducement of the breach of a contract which is null and void, e.g., a wagering contract (m), or of a contract which is determinable at pleasure (n).

2. *Advice distinguished from inducement.*—It will be noticed that the tort is variously described as "procuring" or "inducing" a breach of contract or "interfering with contractual relations". Do these expressions cover mere advice? In the first place it is clear that the advice to be actionable must have been acted upon (o). Simonds, J., has said (p) that "advice which is intended to have persuasive effects is not distinguishable from inducement". On the other hand Slessor, L.J., and Scott, L.J., seem to have thought that some pressure must be used to constitute an inducement (q), and Sir John Salmond's view was that on principle mere advice is not actionable: as when a parent advises his daughter to break an engagement of marriage, or a physician advises a patient to break a contract of service for his health's sake. There must be an inducement in the strict sense—that is to say, the intentional creation of some inducing cause or reason for the breach of contract: for example, to induce a servant to leave his employment by an offer of higher wages, or by a threat to inflict some harm upon him, legal or illegal, if he continues in it. To induce a breach of contract means to create a reason for breaking it; to advise a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter is probably innocent (r).

(k) *Quinn v. Leatham*, [1901] A. C. at p. 510, per Lord Macnaghten.

(l) *Temperton v. Russell*, [1898] 1 Q. B. 715. Cp. *Jasperson v. Dominion Tobacco Co.*, [1928] A. C. p. 713, per Lord Haldane; *G. W. K., Ltd. v. Dunlop Rubber Co.* (1926), 42 T. L. R. 376. See 52 L. Q. R. pp. 501-2, 506, 522.

(m) *Joe Lee, Ltd. v. Lord Dalmeny*, [1927] 1 Ch. 300.

(n) *McManus v. Bowes*, [1938] 1 K. B. p. 127, per Slessor, L.J., *Contrast De Stempel v. Dunkels* (1937), 158 L. T. 85.

(o) *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. p. 737, per Collins, M.R.

(p) *Camden Nominees v. Forsey*, [1940] Ch. p. 366.

(q) *De Stempel v. Dunkels* (1937), 158 L. T. pp. 92, 96.

(r) The question was discussed obiter in *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239. Cp. the difference between advice and persuasion, *infra*, s. 97 (5). Lauterpacht (52 L. Q. R. 503-5) says that the mere concluding of a second inconsistent contract with knowledge of the previous conflicting contract is sufficient to establish liability. But see Goodhart in 54 L. Q. R. pp. 166-7; and in *Batts Combe Quarry Co. v. Ford*, [1942] 2 A. E. R. 639, it was held that the mere acceptance of a proffered bounty in breach of covenant was not

3. *Malice irrelevant.*—Malice, in the sense of improper motive, is not an essential element in this cause of action (s). It is sufficient that the breach of contract is induced knowingly and wilfully (t), and the reasons which animate the defendant are irrelevant. No jury is at liberty to find a verdict for the defendant because in their opinion he was inspired by no improper motive in doing what he did. "No one," it has been said (u), "can legally excuse himself to a man of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or *bona fide*."

4. *Lawful justification.*—To induce a breach of contract is not actionable if there is in the circumstances of the case a legal justification for the inducement (w). What amounts to a justification is a question of law, to which as the authorities stand no precise answer can be given (x), and Romer, L.J., thought that most attempts to give a complete and satisfactory definition would probably be mischievous, and that it must be left to the good sense of the tribunal to analyse the circumstances. In so doing "regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and . . . to the object of the person in procuring the breach" (y). Presumably it would be a good justification if, in inducing a breach of contract made by A with the plaintiff, the defendant was doing nothing more than insisting on the performance of another and

actionable as a procuring. Winfield (59 L. Q. R. 106) thinks it might have been held to be an interfering, relying upon *G. W. K., Ltd. v. Dunlop Rubber Co.* (1926), 42 T. L. R. 376, but that was a case of very active interference.

(s) See *Quinn v. Leatham*, [1901] A. C. p. 510; per Lord Macnaghten; *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. 732; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239.

(t) *British Industrial Plastics v. Ferguson* (1940), 162 L. T. 313; *British Homophone v. Kunz* (1935), 150 L. T. 589. Cp. *Leitch & Co. v. Leydon*, [1931] A. C. 90, where there was no duty to find out whether a breach of contract was involved in the defendant's acts, and see also *Re Simms*, [1934] 1 Ch. 1; 52 L. Q. R. pp. 503-4.

(u) *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. at p. 96, per Darling, J. See also *Pratt v. British Medical Association*, [1919] 1 K. B. 244, 265.

(w) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *Quinn v. Leatham*, [1901] A. C. p. 510; *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310.

(x) See the discussion of this subject 36 H. L. R. 663; 39 H. L. R. 749.

(y) *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K. B. at pp. 574-5. This passage was cited with approval by Russell, J., in *Brimelow v. Casson*, [1924] 1 Ch. p. 311, and was wrongly treated as his dictum, and accepted, by Slessor, L.J., in *British Industrial Plastics v. Ferguson* (1938), 160 L. T. p. 98.

inconsistent contract previously made between himself and A (z). But the breach by B of his contract with A cannot properly be held to justify or excuse A in procuring C to break an independent contract with B (a).

There are *dicta* to be found in the reports which suggest that where the defendant is acting under the pressure of a moral duty he may possibly be justified, as, for example, by Lord James, who instanced as one such example "where the claims of relationship or guardianship demand an interference amounting to protection" (b), and Lord Simon, L.C., has said (c) that a father has a justification arising from moral duty in persuading his daughter to break her engagement to marry a scoundrel. But the suggestion that such a moral or social duty is like that which provides a qualified privilege for the making of defamatory statements (d) was said by Lord Lindley (e) to be misleading and not to be the law. It seems clear that it is no sufficient justification that the defendant was acting "as an altruist, seeking only the good of another and careless of his own advantage" (f) or that he was performing a public service (g). It has frequently been held that it is no justification that an association has a duty cast upon it to protect the interests of its members and has acted in pursuance of that duty (h); but in *Brimelow v. Casson* (i) Russell, J., held

(z) *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. p. 95; *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. 310; *Pratt v. British Medical Association*, [1919] 1 K. B. 244, 265.

(a) *Smithies v. National Association of Operative Plasterers*, [1909] 1 K. B. p. 341, *per* Kennedy, L.J.

(b) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. p. 249. *Cp.* Lord Halsbury, L.C., S. C. p. 245, and Simonds, J., in *Camden Nominees v. Forcey*, [1940] Ch. p. 366.

(c) *Crofter Hand-Woven Harris Tweed Co. v. Veitch*, [1942] A. C. pp. 442-3. But this may perhaps be better explained as an instance of advice in distinction from inducement.

(d) *Infra*, s. 109.

(e) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. p. 255.

(f) *Read v. Friendly Society of Stonemasons*, [1902] 2 K. B. p. 97, *per* Darling, J.

(g) *Camden Nominees v. Forcey*, [1940] Ch. p. 366, *per* Simonds, J.

(h) *E.g.*, *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 289.

(i) [1924] 1 Ch. 302. This decision received the approval of Sir Frederick Pollock (40 L. Q. R. 139) and is apparently accepted as good law in America (83 Mich. L. R. 945), and by Lord Porter in the *Crofter Co. Case*, *supra*, p. 496. But Simonds, J., in *Camden Nominees v. Forcey*, [1940] Ch. pp. 364, 366, said that this case stands alone, for this ground for the decision of Slessor, L.J., in *British Industrial Plastics v. Ferguson* (1938), 160 L. T. p. 98, was only *obiter*, and he thought that the case could have been simply disposed of by the application of the maxim *Ex turpi causa non oritur actio*. But that solution seems to involve the proposition that any contract of service at so low a wage that it tends to drive the employee to supplement her wages by prostitution is unenforceable.

that the defendants, who were members of the theatrical Joint Protection Committee, were justified in inducing theatre proprietors to break contracts, their object being to improve the status of the theatrical profession and to stop the evils which result from under-payment in it.

5. *Agent procuring breach of contract by his principle.*—Notwithstanding the general rule, a servant or agent acting on behalf of his employer or principal within the scope of his employment or authority is not liable in tort for inducing or procuring a breach of contract by his employer or principal. If, for example, a company acting by its directors breaks its contract, the only remedy of the other party is to sue the company for breach of contract; he cannot sue the directors for the tort of inducing that breach (*k*).

6. *Exception in case of trade disputes.*—An exception to the rule in *Lumley v. Gye* has been established by section 3 of the Trades Disputes Act, 1906, which provides that “an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment”. The purpose of this enactment is to facilitate strikes by exempting those who instigate them from the necessity of respecting the contractual rights of the employers. By the Trade Disputes and Trade Unions Act, 1927, this protection is no longer accorded to any acts done in contemplation or furtherance of a strike or lock-out which is declared to be illegal by that Act (*l*). Nor it would seem does section 3 of the 1906 Act afford any protection to one who induces a breach of contract other than a contract of employment (*m*).

## § 97. Husband and Wife

1. *Injuries to a husband by depriving him of his wife's society or services.*—It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (a) the act is wrongful as against the wife, and (b) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife,

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(*k*) *Said v. Butt*, [1920] 3 K. B. 497; *Scammell v. Hurley*, [1929] 1 K. B. 419. See, however, Porter, J., in *de Jetley Marks v. Greenwood*, [1936] 1 A. E. R. p. 872, and Winfield, 643.

(*l*) S. 1 (4). *Supra*, s. 14.

(*m*) *Brimelow v. Casson*, [1924] 1 Ch. p. 314, *per* Russell, J.

just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services (*per quod consortium amisit* or *servitium amisit*) (n).

2. *Concurrent remedies*.—The two causes of action thus vested in a wife and her husband respectively are concurrent and cumulative. Thus, if a married woman suffers physical harm in a railway accident, the company is liable in two actions—one at the suit of the wife for the damage so sustained by herself, and another at the suit of the husband alone for the injury done to him. These two actions may be brought separately or together (o).

3. *Death of wife*.—If the wife is not merely injured but killed, the husband's claim for loss of *consortium et servitium* is limited to the interval between her injury and her death (p); but he may have a claim to compensation for her death under the Fatal Accidents Act, or even at common law if the cause of her death was a breach of contract as between himself and the defendant (q).

4. When there is no loss of *consortium et servitium* the husband has no action: as when he was at the time of the act complained of permanently separated from his wife (r).

5. *Inducing a wife to leave her husband*.—In the absence of lawful justification, it is a tort actionable at the suit of a husband to induce his wife to leave him or to remain away from him against his will (s). A husband has no longer, indeed, any right or power, whether by way of judicial proceedings or otherwise, of compelling his wife to live with him (t). But it is still the duty of the wife to reside and consort with her husband, and the Court has power to order pecuniary allowances if she fails in that duty. The husband has a right of action for damages against any person who procures, entices or persuades her to violate this duty (u). Mere

(n) Bl. Comm. III, 139; *Baker v. Bolton* (1808), 1 Camp. 493; *Brookbank v. Whitehaven Ry.* (1862), 7 H. & N. 834.

(o) *Brookbank v. Whitehaven Ry.* (1862), 7 H. & N. 834.

(p) *Baker v. Bolton* (1808), 1 Camp. 493.

(q) *Jackson v. Watson & Sons*, [1909] 2 K. B. 193. *Vide supra*, s. 92.

(r) *See Weedon v. Timbrell* (1793), 5 T. R. 357; *Izard v. Izard* (1889), 14 P. D. 45.

(s) *Winsmore v. Greenbank* (1745), Willes 577; *Smith v. Kaye* (1904), 20 T. L. R. 261.

(t) *R. v. Jackson*, [1891] 1 Q. B. 671.

(u) *Place v. Searle*, [1932] 2 K. B. 497.

advice is not sufficient. The difference between advice and persuasion is one of degree. In *Place v. Searle* (w) it was held that the words, "Come on, Gwen! We will go", might in the circumstances amount to persuasion. The husband need not prove that the will of the wife was overborne by the stronger will of the enticer. It is, however, a sufficient justification for such enticement that owing to the husband's conduct the wife is justified, or is (it would seem) honestly believed by the defendant to be justified, in leaving her husband (x). Whether there is any other lawful justification for such an interference between husband and wife does not appear from the authorities.

6. *Adultery*.—The gist of the action for loss of *consortium* is that the defendant enticed the plaintiff's wife to give up cohabitation and to abandon the *consortium* to which he was entitled. It is not enough that the defendant enticed her to make love to him or to commit adultery with him (y). To commit adultery with a married woman is a wrong against her husband, but he can recover damages for it only by petition in the Probate, Divorce, and Admiralty Division of the High Court of Justice, and not in an ordinary action (z). Adultery was formerly a tort actionable by writ of trespass, the action being known as that of criminal conversation. This action was abolished by the Matrimonial Causes Act, 1857, which substituted for it a petition in the Divorce Court, either with or without a petition for divorce (a). A husband's claim for damages in such a petition is now under the Supreme Court of Judicature (Consolidation) Act, 1925 (aa) governed by the same principles which formerly regulated the action of criminal conversation (b).

7. *Injuries to a wife*.—The rights of action of a married woman in respect of injury done to her by depriving her of her husband's society or services are similar. There is no precedent for any

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(w) [1932] 2 K. B. 497.

(x) *Berthon v. Cartwright* (1796), 2 Esp. 480; *Philp v. Squire* (1791), 1 Peake 114.

(y) *Newton v. Hardy* (1938), 149 L. T. 165; *Elliott v. Albert*, [1934] 1 K. B. 650.

(z) But where adultery follows upon the enticement damages for the adultery may be recovered in the action for enticement: *Menon v. Menon*, [1936] P. 200.

(a) Ss. 33, 59.

(aa) S. 189 (2).

(b) But if the adultery has been condoned the petitioner will not be entitled even to nominal damages: *Bernstein v. Bernstein*, [1893] P. 292; *Cox v. Cox*, [1906] P. 267. As to the measure of damages for adultery, see *Butterworth v. Butterworth*, [1920] P. 126.

action by a wife for the loss of the society or support of her husband by reason of any wrongful act committed against the husband—for example, false imprisonment. But there seems no sufficient reason why at the present day such an action should not lie (c).

No action will lie at the suit of a wife for adultery committed with her husband (d). But she can sue a third person who entices, procures or persuades him to cease from consorting with her (e). Moreover, there is some authority for saying that where a tort committed against a wife produces, as its intended or natural result, a loss of the *consortium* of her husband, this is to be taken into account in estimating damages: for example, a slander published against a wife with the result that her husband refuses to live with her (f). For the death of her husband a wife, if dependent, may claim compensation under the Fatal Accidents Act (g).

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(c) Salmond thought otherwise (8th ed., p. 396), but the passage cited by him from Blackstone (Comm. III, 143) gives reasons which are now obsolete.

(d) *Lynch v. Knight* (1861), 9 H. L. C. p. 589; *Newton v. Hardy* (1933), 149 L. T. 165; *Elliott v. Albert*, [1934] 1 K. B. 650.

(e) This cause of action is now given statutory recognition by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1).

(f) *Lynch v. Knight* (1861), 9 H. L. C. p. 589, *per* Lord Campbell; p. 595, *per* Lord Cranworth. *Contra*, p. 597, *per* Lord Wensleydale.

(g) *Supra*, s. 92.



## CHAPTER XIII

## DEFAMATION

## § 98. Defamation Defined. Libel and Slander

1. *Defamation defined.*—The wrong of defamation consists in the publication of a false and defamatory statement respecting another person without lawful justification.

2. A defamatory statement is not necessarily made in words, either written or spoken. A man may defame another by his acts, no less than by his words. To exhibit an insulting picture holding up the plaintiff to ridicule or contempt is an actionable libel (a). So also is the act of placing an effigy of the plaintiff among those of murderers and other ill-famed persons in an exhibition (b).

*Libel distinguished from slander.*—The wrong of defamation is of two kinds—namely, libel and slander (c). In libel the defamatory statement is made in some permanent and visible form, such as writing, printing, pictures, or effigies. In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures or inarticulate but significant sounds (d).

It is not always easy to determine whether in a particular case the proper cause of action is libel or slander. Is the true differentia between the two that slander is addressed to the ear, libel to the eye? Or is it that libel is defamation crystallised into some permanent form, while slander is conveyed by some transient method of expression? (e). The Court of Appeal in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* (f) did not have much difficulty in holding that defamation on a “talking” film was libel. “There can be no doubt,” said Slesser, L.J., “that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action

(a) *Du Bost v. Beresford* (1810), 2 Camp. 511; *Garbett v. Hazell, Watson and Viney*, [1943] 2 A. E. R. 359 (juxtaposition of pictures with captions).

(b) *Monson v. Tussaud's, Ltd.*, [1894] 1 Q. B. 671.

(c) Libel and slander give rise to distinct causes of action even if the nature of the defamation is the same in both: libel is one genus, slander a different genus: *Weber v. Birkett*, [1925] 1 K. B. 720; [1925] 2 K. B. 152.

(d) *Monson v. Tussaud's, Ltd.*, [1894] 1 Q. B. p. 692, *per Lopes, L.J.*

(e) *Button*, p. 13.

(f) (1934), 50 T. L. R. 581.

for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen." On the other hand the Court of Appeal in Victoria had little difficulty in deciding that broadcasting on the wireless from a script was slander, not libel (*g*). But there is no authority as to whether defamatory matter recorded on a gramophone disc (unaccompanied by any pictorial or other matter) is libel or slander. Professor Winfield thinks it is slander (*h*), others think it is libel (*i*). It is addressed to the ear, not to the eye, but it is in permanent, not in transient form. It is submitted that the correct answer is that to utter defamatory words with the intention that they shall be recorded is slander only, but that when the record has been made, if it is published, the manufacturer is responsible for libel. In such a case the person whose voice is recorded would, it seems, become liable for libel on the ordinary principles of vicarious liability (*k*), and presumably those who distribute or play the record to third persons are in the same position as the disseminators of a written libel (*l*).

Although libel and slander are for the most part governed by the same principles, there are two important differences :

- (a) Libel is not merely an actionable tort, but also a criminal offence; whereas slander is a civil injury only.
  - (b) Libel is in all cases actionable *per se*; but slander is, save in special cases, actionable only on proof of actual damage.
- We shall consider later what these cases are, and what forms of actual damage are a sufficient cause of action.

The different rules applicable to the wrongs of libel and slander are due to the different historical origin of the two actions. The rules relating to slander derive from the common law action on the case, the rules relating to libel from criminal proceedings in the Star Chamber. Hence the anomaly, if anomaly it be (*ll*), of an action on the case in which it is unnecessary to prove damage (*m*).

(*g*) *Meldrum v. Australian Broadcasting Co.* (1932), Vict. L. R. 428. See 51 L. Q. R. p. 573, and cp. *Bergman v. Macadam*, *The Times*, October 8, 1940. See also 46 H. L. R. 133-8.

(*h*) 51 L. Q. R. p. 282, and Torts, pp. 266-7; cp. 51 L. Q. R. p. 574.

(*i*) *E.g.*, Landon in Pollock, p. 188; Button, p. 14; Iyer, p. 300.

(*k*) *Vide infra*, s. 104 (2) (3), *supra*, 24 (1), 34 (25).

(*l*) *Infra*, s. 104 (2) (7). According to Fraser, Libel, p. 5, "sky-writing" would probably constitute libel.

(*ll*) *Vide supra*, s. 33 (3).

(*m*) For the history of the two actions, see Holdsworth, H. E. L. v. 205-212, viii, 333-378; Veeder, A. A. L. H. iii, 446. Formerly the utmost strictness of

### § 99. The Defamatory Nature of a Statement

1. *Definition*.—A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally (*n*) and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem (*o*).

2. *Defamatory statements distinguished from injurious statements*.—A defamatory statement must be distinguished from one which is merely injurious. Both are falsehoods told by one man to the prejudice of another, and both are on certain conditions actionable; but they are to a large extent governed by different rules. An injurious statement is a falsehood told about another which in no way affects his reputation, but nevertheless in some other manner causes loss to him. Thus, it is not defamatory to state in a newspaper that a certain tradesman has ceased to carry on business; yet if this statement is wilfully false, and causes him actual damage, an action will lie for it (*p*). But to state falsely that he carries on business incompetently or dishonestly is defamatory, and an action will lie even though the statement is not wilfully false and even though actual damage has not been caused by it. Similarly, to say falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the wrong of defamation, but that of injurious falsehood; but to say of him that he fraudulently sells inferior goods as of superior quality is an attack, not merely upon his business, but upon his reputation, and is therefore defamatory (*q*). The law of injurious falsehood, as distinguished from that of defamation, will be considered in a later chapter (*r*).

3. *Insult or vulgar abuse*.—Mere insult or vulgar abuse does not amount to defamation (*s*). Defamation is a false statement or

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proof was required in actions of slander: now it is enough if the plaintiff proves words equivalent in substance to the defamation alleged: *Phelps v. Kemsley* (1942), 168 L. T. p. 20, *per* Goddard, L.J.

(*n*) *Sim v. Stretch* (1936), 52 T. L. R. p. 671, *per* Lord Atkin.

(*o*) *Parmiter v. Coupland* (1840), 6 M. & W. p. 108; *Capital & Counties Bank v. Henty* (1892), 7 A. C. p. 771; *South Hetton Coal Co. v. N. E. News Association*, [1894] 1 Q. B. p. 138.

(*p*) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. *Infra*, s. 151.

(*q*) See *Linotype Co. v. British Empire Type-setting Machine Co.* (1889), 81 L. T. 331; *South Hetton Coal Co. v. N. E. News Association*, [1894] 1 Q. B. p. 139; *Bendle v. United Kingdom Alliance* (1915), 31 T. L. R. 403.

(*r*) Ch. XXI, *infra*.

(*s*) *Parkins v. Scott* (1862), 1 H. & C. 153 ("You have been a whore from your cradle"). See on this Pound in 28 H. L. R. 445, *Harvard Essays*, 110—18.

suggestion of fact to the prejudice of a man's reputation; insult consists in words or conduct offensive to a man's dignity. Insult in itself seems to be no cause of action by the law of England (t), though particular forms of insult are actionable because accompanied by other facts which confer a right of action. Assault, false imprisonment, and certain kinds of wilful and wanton trespasses to property amount to insults, as being attacks upon the dignity of the plaintiff as well as upon his person or property; and vindictive damages may accordingly be obtained for them (u). Insulting threats not amounting to assault are apparently not actionable at all. Winfield says that written, as distinguished from spoken, words cannot be defended on the ground that they were mere abuse, for there is time for reflection (w), but this is inconsistent with the fact that abuse is one thing, defamation another.

4. *Kinds of defamatory statement.*—The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff, attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, ingratitude, or cruelty (x). A statement, however, is defamatory if it tends to bring the plaintiff into ridicule, even though there is no suggestion of any form of misconduct (y). An action will lie, therefore, for the publication of a humorous story which exhibits the plaintiff in a ridiculous light, or for a caricature of his personal appearance or manners (z).

The conventional phrase is that a statement is defamatory if it exposes the plaintiff to hatred, ridicule or contempt, but the field of defamation is a wide one. Cave, J., included in it all "false statements to a man's discredit" (a), and Slessor, L.J., all statements which "tend to make the plaintiff be shunned and avoided", even though no moral discredit is involved (b). But even these statements seem scarcely wide enough and the test

(t) Contrast Roman-Dutch Law: McKerron, *Delicts*, § 58.

(u) *Supra*, s. 33 (3).

(w) Winfield, pp. 267—8.

(x) *Coz v. Lee* (1869), L. R. 4 Ex. 284; *Clement v. Chivis* (1829), 9 B. & C. 172; *De Stempel v. Dunkels* (1937), 158 L. T. p. 90.

(y) *Cook v. Ward* (1830), 6 Bing. 409; *Cropp v. Tilney* (1693), 3 Salk. 225. Contrast *Emerson v. Grimsby Times* (1926), 42 T. L. R. 238.

(z) *Dunlop Rubber Co. v. Dunlop*, [1920] 1 Ir. R. 280; [1921] 1 A. C. 367 (caricatures of Mr. Dunlop in advertisements).

(a) *Scott v. Sampson* (1882), 8 Q. B. D. p. 503, approved by Scrutton, L.J., in *Yousoupoff v. Metro-Goldwyn-Mayer Pictures* (1934), 50 T. L. R. p. 584.

(b) *S. C.*, p. 587.

proposed by Lord Atkin (c) is to be preferred—"Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

5. *Incapacity, insanity, insolvency, and misfortune.*—Thus a statement is defamatory if it amounts to a reflection upon the fitness or capacity of the plaintiff in his profession or trade, or in any other undertaking assumed by him (d). So Mr. Pett Ridge, the novelist, recovered damages against the publishers of a magazine for publishing under his name a story of which he was not the writer, on the ground that anyone reading the story would think him a mere commonplace scribbler (e). So also a statement is defamatory if it attributes insanity to the plaintiff, though insanity is a misfortune, not a fault (f), or if it imputes insolvency to a trader, even though there is no suggestion of discreditable conduct or incapacity (g), or if it contains an allegation that a woman has been raped (h). But it is not defamatory if it merely alleges a breach of conventional etiquette (i)—presumably because that does not lower the plaintiff in the estimation of right-minded people.

6. *Opinions of a particular class of persons.*—A statement is not defamatory merely because it excites hatred, contempt, ridicule, or other adverse feelings in some particular class of the community whose standard of opinion is such that the law cannot approve of it or notice it. "We have to consider in this connection the *arbitrium boni*, the view which would be taken by the ordinary good and worthy subject of the King" (k). Thus in *Byrne v. Deane* (l) the plaintiff complained of a type-written notice

(c) *Sim v. Stretch* (1936), 52 T. L. R. p. 671. This test was applied in *Holds-worth v. Associated Newspapers*, [1937] 3 A. E. R. 872.

(d) *Capital & Counties Bank v. Henty* (1882), 7 A. C. p. 771; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Sadgrove v. Hole*, [1901] 2 K. B. 1.

(e) *Ridge v. The English Illustrated Magazine* (1913), 29 T. L. R. 592. This was followed in *Pryce v. Pioneer Press* (1925), 42 T. L. R. 29. Cp. *Archbold v. Sweet* (1832), 5 C. & P. 219.

(f) *Morgan v. Ligan* (1863), 8 L. T. (N.S.) 800; *Hodson v. Pare*, [1899] 1 Q. B. 455.

(g) *Read v. Hudson* (1700), 1 Lord Raym. 610; *Shepherd v. Whitaker* (1875), L. R. 10 C. P. 502.

(h) *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* (1934), 50 T. L. R. 581. See, however, *Winfield* in 51 L. Q. R. p. 282.

(i) *Clay v. Roberts* (1863), 8 L. T. 397; *Sim v. Stretch* (1936), 50 T. L. R. p. 672.

(k) *Byrne v. Deane*, [1937] 1 K. B. p. 833, *per* Slesser, L.J.

(l) [1937] 1 K. B. 818; cp. *Mawe v. Pigott* (1869), Ir. Rep. 4 C. L. 54. See also *Clay v. Roberts* (1863), 8 L. T. (N.S.) 397; *Miller v. David* (1874), L. R. 9 C. P. 118; *Tolley v. Fry*, [1930] 1 K. B. p. 479, *per* Greer, L.J.

which suggested that he had been guilty of disloyalty to his fellow-members of a golf club by reporting to the police that there were some "diddler" machines, gambling machines, kept on the premises. Though it is quite clear that any such charge would lower the plaintiff in the estimation of most of his fellow-members, it was held that it cannot be defamatory to say of a man that he has put in motion the proper machinery for suppressing crime, and it matters not that many may feel that the particular crime should never have been made a crime at all. "It may very well be that the Legislature in its wisdom has made into a crime something which the public conscience of many persons in this country does not consider involves any sort of moral reprobation" (m). For the same reason a statement is none the less defamatory because the defendant did not intend to bring the plaintiff into hatred, ridicule or contempt. The defendant will be liable though he wrote in levity only. "No one can cast about firebrands and death, and then escape from being responsible by saying he was in sport" (n). The "ordinary, just and reasonable citizen" is the criterion by which the defamatory character of the words is tried (o).

### § 100. Defamation of a Corporation

1. *When a corporation can sue for defamation.*—A statement is defamatory of a corporation, and is actionable as such at the suit of the corporation, if both of the two following conditions exist, but not otherwise: (a) the statement must be of such a nature that it would have been defamatory had it been directed against an individual; (b) it must also be of such a nature that its tendency is to cause actual damage to the corporation in respect of its property or business.

2. An incorporated company or other body corporate has in truth no reputation to be injured. It is a fictitious person, and cannot in the nature of things be brought into hatred, ridicule, or contempt by any manner of falsehood. The reputation that is in reality assailed by a charge made against a corporation is the repu-

(m) *Byrne v. Deane*, [1937] 1 K. B. p. 840, *per* Greene, L.J.

(n) *Capital & Counties Bank v. Henty* (1882), L. R. 7 A. C. p. 772, *per* Lord Blackburn.

(o) *Myroft v. Sleight* (1921), 90 L. J. K. B. 883, *per* McCardie, J. In *Burns v. Associated Newspapers* (1925), 43 T. L. R. 37, Astbury, J., said that it was probably libellous to call a man a Communist. What is defamatory to-day may not be defamatory to-morrow. So during the war of 1914-18 it was defamatory to say of a firm that it was German: *Slazengers, Ltd. v. Gibbs* (1916), 33 T. L. R. 35.

tation of the members or other agents by whom the affairs of the corporation are conducted. Yet by attacking in this manner the reputation of its members and agents damage may be caused to the corporation itself in respect of its business and property. For any defamatory statement, therefore, which produces such actual damage the corporation may sue. Nor is it necessary to prove that such damage has actually accrued; it is sufficient if the defamatory statement is of such a kind that its tendency is to cause harm of this nature (p).

3. Thus, an action of libel will lie at the suit of a trading corporation charged with insolvency or with dishonest or incompetent management (q). Similarly, a coal-mining company may sue on a charge of failing to supply decent and sanitary accommodation for its workmen and their families; for such an accusation tends to injure it in its business (r). On the same principle, even a non-trading corporation, such as a municipal body or an Oxford College, may presumably sue for a libel tending to its pecuniary damage.

But where there is no actual damage nor any tendency to produce such damage, no action will lie at the suit of the corporation; the only persons who have any cause of action are the individual members or agents of the corporation who have been defamed. Thus, in *Mayor of Manchester v. Williams* (s) it was held that a municipal corporation could not sue for a libel charging it with corruption and bribery in the administration of municipal affairs.

### § 101. Proof of Reference to the Plaintiff

1. It is essential in every action for defamation that the defamatory statement should be shown to refer to the plaintiff. It is never necessary, however, that this reference should be express. It may be latent; and it is sufficient in such a case that it should have been understood even by one person, although it remained hid from all others. "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is

(p) *Irish People's Assee. Co. v. Dublin City Assee. Co.*, [1929] Ir. R. 25.

(q) *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87.

(r) *South Hetton Coal Co. v. N. E. News Association*, [1894] 1 Q. B. 133.

(s) [1891] 1 Q. B. 94. *Contrast D. & L. Caterers v. D'Ajou* (1945), 61 T. L. R. 212.

inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated" (t).

Thus, in *Le Fanu v. Malcolmson* (u) the defendants published in a newspaper a statement that in some of the Irish factories cruelties were practised upon the workpeople, and they were held liable on a finding by the jury that the statement was understood to refer specially to the plaintiff's factory. But in such a case the facts or circumstances which justify reasonable people in construing the words complained of as referring to the plaintiff are a material part of the plaintiff's cause of action, and, if they are not set out in the statement of claim, the plaintiff must give particulars of them (w).

2. *Reference to plaintiff need not be intentional.*—It is not necessary that the defendant should have intended the defamatory statement to refer to the plaintiff. The question in each case is not whether the defendant intended any such reference, but whether any person to whom the statement was published might reasonably think that the plaintiff was the person referred to. Nor is it any defence that the defendant had no reason to suppose that any such reference would be attributed to his words, or even did not know that any such person as the plaintiff existed. This application or extension of the doctrine that a man publishes defamatory statements at his peril is generally regarded as established by the House of Lords in *Hulton & Co. v. Jones* (x)—a case which, to use the

(t) *Le Fanu v. Malcolmson* (1848), 1 H. L. C. p. 668.

(u) (1848), 1 H. L. C. 637.

(w) *Bruce v. Odhams Press*, [1936] 1 K. B. 697. This is sometimes spoken of as proving the innuendo; *S. C.* p. 708, *per* Slesser, L.J.

(x) [1910] A. C. 20. In earlier editions (9th ed., s. 106 (3)) it was submitted that the true *ratio decidendi* of this case was that the defendant is liable if he has been reckless in publishing the defamatory statement. In *Hulton v. Jones* the plaintiff was in fact well known in the office of the defendants and had done work for them. The actual writer of the article and the editor of the paper in which it appeared had no knowledge of the plaintiff's existence, and no proceedings were taken against them. Lord Hewart (who was counsel for the plaintiff at all three stages of the trial) often told the editor of this book that this was the foundation of the House of Lords' decision. He presumably directed the jury in accordance with this view in *Canning v. William Collins & Co.* (1938), 186 L. T. Jo. 40. But the Court of Appeal in *Newstead v. London Express Newspaper, Ltd.*, [1940] 1 K. B. 377, rejected this interpretation, and Greene, M.R., said (at p. 388) that the law was well settled and could only be altered by legislation. But it is submitted that it is still open to the House of Lords to adopt the less severe interpretation of the decision in question: *cp.* Holdsworth in 57 L. Q. R. p. 31. See also 26 L. Q. R. 103-4, Holdsworth, H. E. L. viii, 370. In Roman-Dutch law liability is limited to reckless publication: McKerron, s. 63. A committee is at present in being to consider the law of libel in all its aspects. *Vide* further *infra*, s. 103 (8) to (10).



words of Goddard, L.J. (y), added "a terror to authorship". "Liability for libel", said Russell, L.J. (z), "does not depend on the intention of the defamer; but on the fact of defamation." In *Hulton's Case* a newspaper published an article descriptive of life in Dieppe, in which one "Artemus Jones", described as a churchwarden at Peckham, was accused of living with a mistress in France. The writer of the article was ignorant of the existence of any person of the name of Artemus Jones, and invented the name as that of the fictitious character in his narrative. Unfortunately, however, the name so chosen was that of a real person, an English barrister and journalist, and those who knew him supposed the newspaper article to refer to him. It was held by a majority of the Court of Appeal that the newspaper was responsible for a libel, and the decision was unanimously affirmed by the House of Lords.

3. *Statements true of some other person.*—Even if the defamatory words are true of some other person it is not as a matter of law impossible for them to be at the same time defamatory of the plaintiff. They may be understood by reasonable persons to refer to him (a). Thus in *Newstead v. London Express Newspaper, Ltd.* (b) the defendants published an account of a trial for bigamy of "Harold Newstead, thirty-year-old Camberwell man". It was a true account of the trial of one Harold Newstead, a Camberwell barman, but not of Harold Newstead, a Camberwell hairdresser, of about the same age. The Court of Appeal held that the jury would have been justified in finding that reasonable persons would have understood the words complained of to refer to the latter. Where the words complained of are *ex facie* defamatory the hardship is not so serious as might appear. Writers who publish such statements may be not unreasonably expected to identify the person described so closely that the words cannot reasonably be capable of referring to someone else (c). And if there is a risk of coincidence why should it not be borne by the party who puts the mischievous words in circulation rather than by the innocent person to whom the words are taken to refer? (d). If the defen-

(y) *Knupffer v. London Express Newspapers, Ltd.*, [1943] 1 K. B. p. 89.

(z) *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B. p. 354.

(a) Farwell, L.J., thought otherwise: *Jones v. Hulton*, [1909] 2 K. B. p. 481. Cp. *Shaw v. London Express Newspaper* (1925), 41 T. L. R. 475 (plaintiff by a coincidence having the same name as a murderer).

(b) [1940] 1 K. B. 377.

(c) See the entertaining and caustic judgment of MacKinnon, L.J., *S. C.*, pp. 391-3.

(d) *S. C.*, p. 388, *per* Greene, I.J.

dant is blameless the jury will no doubt take that fact into consideration in assessing the damages, though perhaps they should not award anything in the nature of vindictive damages (*dd*).

4. *Defamation of classes of persons.*—It has sometimes been said that the general rule is that where defamatory words are written or spoken of a class of persons it is not open to a member of that class to say that they are written or spoken of him (*e*). But in fact there is no such general rule. In every case where the plaintiff is not named the test whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. If the words can be regarded as capable of referring to the plaintiff, the jury still have to decide the question of fact—do they lead reasonable people, who know him, to the conclusion that they do refer to him? (*f*). “A class cannot be defamed as a class nor can an individual be defamed by a general reference to the class to which he belongs” (*ff*). “The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was in fact included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration” (*g*). Thus no action would lie at the suit of anyone for saying that all mankind is vicious and depraved, or even for alleging that all clergymen are hypocrites or all lawyers dishonest (*gg*). For charges so general in their nature are merely vulgar generalisations. But when the class is so small or so completely ascertainable that what is said of the class is necessarily said of every member of it, then a member of the class can sue (*h*). “To accuse a jury or a body of trustees of corruption would necessarily impute corruption to all, but to say that a political party is corrupt cannot mean that every member of that party is corrupt, even though the minds of voters in a constituency might turn to their member who happened

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(*dd*) *Vide supra*, s. 33 (3).

(*e*) *Knupffer v. London Express Newspapers*, [1943] K. B. 80, pp. 88, 89.

(*f*) *Knupffer v. London Express Newspapers*, [1944] A. C. 116, at p. 121, per Lord Simon, L.C.

(*ff*) *Ibid.*, p. 124, per Lord Porter.

(*g*) *Ibid.*, p. 122, per Lord Atkin.

(*gg*) *Eastwood v. Holmes* (1858), 1 F. & F. 347. But see Lord Atkin in *Knupffer's Case*, [1944] A. C. p. 122.

(*h*) *Broune v. Thomson*, [1912] S. C. 359. *Knupffer v. London Express Newspapers*, [1943] K. B. p. 84.

to belong to that party" (i). Again, although the words purport to refer to a class, if in fact in the particular circumstances of the case they point to one or more individual persons, those persons will have an action (j). "In deciding the question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration" (k).

5. *Defamation of unspecified members of a class.*—Similarly, an imputation may be defamatory and actionable at the suit of the plaintiff if it is made against some unspecified members of a class to which he belongs even though it is impossible to show that the defendant meant or was understood to mean the plaintiff individually. Thus, if the defendant says in writing that his horse has been stolen either by A or B, he knows not which, then both A and B will have an action against him, for both are thereby brought under suspicion and defamed (l). But here also the class must not be so large that the charge ceases to affect the reputation of any individual member of it.

### § 102. Interpretation of Defamatory Statements

*Defamatory nature a question for the jury.*—The interpretation of a defamatory statement is a question of fact for a jury. Since Fox's Act, 1792, "libel or no libel" has always been essentially a question for the jury (m). The right of the jury in this matter is subject, however, to one limitation. The Judge must first be satisfied that there is sufficient evidence to go to the jury—that is to say, he must be satisfied that the statement is reasonably capable of the meaning which the plaintiff alleges and complains of, and if he considers that it is not so capable, the case must be withdrawn from the jury altogether. "The words," said Lord Halsbury, in *Nevill v. Fine Art and General Insurance Co.* (n), "must be susceptible of a libellous meaning in this sense: that a reasonable man

(i) *S. C.* p. 88, per Goddard, L.J.

(j) *S. C.* p. 84; *Le Fanu v. Malcolmson* (1848), 1 H. L. C. 637.

(k) *Knappfer's Case*, [1944] A. C. p. 124, per Lord Porter.

(l) *Harrison v. Thornborough* (1713), 10 Mod. 196. A verbal statement to this effect, however, would presumably fall within the rule that in the case of the imputation of a criminal offence words of mere suspicion are not actionable without proof of special damage. See *infra*, s. 118 (2).

(m) *Capital & Counties Bank v. Henty* (1882), 7 A. C. p. 775; *Broome v. Agar* (1928), 138 L. T. 698, where Scrutton, L.J., gives the history of the change. See Holdsworth, H. E. L., viii. 342-5.

(n) [1897] A. C. p. 76.

could construe them unfavourably in such a sense as to make some imputation upon the person complaining."

Thus, in *Capital and Counties Bank v. Henty* (o) the defendants, having had a dispute with one of the branch managers of the plaintiffs' bank, sent a circular notice to their own customers (p) in the words: "Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." An action for libel was thereupon brought by the bank, alleging that the notice was defamatory, inasmuch as it amounted to an imputation of insolvency. It was held, however, by the House of Lords that the statement was not reasonably capable of such a meaning, and that there was no case fit to be left to a jury, although the notice resulted in a run of a quarter of a million pounds on the bank immediately it was issued (q).

On the other hand, the words may be so plainly and necessarily defamatory that the Judge should instruct the jury that they are calculated to bring the plaintiff into hatred or contempt, and should forthwith proceed to direct their attention to the question of damages. If the jury should then find a verdict contrary to his direction, it may be deemed perverse and set aside, and a new trial may be ordered. If a jury found a plain and obvious defamation, incapable of any innocent explanation, to be non-libellous, their verdict would certainly be set aside (r). But the circumstances must be very exceptional to justify such a course (s). And this is especially so in the case of slander. Sankey, L.J., has said (t): "In an action for slander a Judge is not entitled to say to the jury: 'I direct you that the words spoken of are defamatory and your duty is to assess damages.' Spoken words divorced from their context and surroundings may appear to be a slander which when controlled by such context and such surroundings are nothing of the sort. Gesture, tone of voice, expression of countenance, all of which are absent in libel, may materially affect the spoken words (u). One recalls the instance of the lady who in a West End

(o) (1882), 7 A. C. 741. Cp. *Plunkett v. Barclays Bank*, [1936] 2 K. B. 107.

(p) This was an important point: see *Tolley v. Fry*, [1931] A. C. p. 342.

(q) Scrutton, L.J., speaks of the "somewhat unfortunate results of this rule" in *Youssouppoff v. Metro-Goldwyn-Mayer Pictures* (1934), 50 T. L. R. p. 584.

(r) *Lockhart v. Harrison* (1928), 139 L. T. 521, pp. 524, 523 (see the amusing explanation of this case given by Norman Birkett, K.C., the plaintiff's counsel, in 176 L. T. Jo. 453); *Parmiter v. Coupland* (1840), 6 M. & W. 105.

(s) *Lockhart v. Harrison*, *supra*; *Broome v. Agar* (1928), 138 L. T. 698.

(t) *Broome v. Agar* (1928), 138 L. T. p. 702.

(u) But vide *infra*, s. 103 (2).

drawing room accused a noble lord of being a thief, but when one is told that she said with a smile : ' Lord X, you are a thief, you have stolen my heart,' one recognises that to call a person a thief is not necessarily actionable." So in *Broome v. Agar* (v), a mistress said of her chauffeur that he was out "joy-riding" with her car and that he was a "rotter", but the jury found that these words were not defamatory. The Court of Appeal by a majority refused to grant a new trial.

### § 103. The Innuendo

1. *Innuendo*.—It is clear then that no statement is necessarily and in all circumstances defamatory. There is no charge or imputation, however serious on the face of it, which may not be explained away by evidence that in the special circumstances of the case it was not issued or understood in a defamatory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense, and that it was or ought to have been understood in that sense by those to whom it was made. Even the term "Ananias" is not necessarily defamatory (w). Conversely, no statement is necessarily and in all circumstances innocent. An allegation which on the face of it contains no imputation whatever against the plaintiff may be proved from the circumstances to have contained a latent and secondary defamatory sense. It may suggest an imputation which it does not express. Thus, even the language of praise may be sued on as defamatory, on proof that it was used in the way of irony (x).

2. Although no statements are necessarily defamatory or necessarily innocent, yet all statements are divisible into two classes, according as they are (1) *prima facie* and on the face of them defamatory, or (2) *prima facie* and on the face of them innocent. A statement is *prima facie* defamatory when its natural, obvious, and primary sense is defamatory : such a statement is actionable unless its defamatory significance is successfully explained away ; and the burden of such an explanation rests upon the defendant. A statement *prima facie* innocent, on the other hand, is not actionable unless its latent or secondary defamatory meaning is sufficiently proved by the plaintiff. So the plaintiff

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(v) (1928), 138 L. T. 698.

(w) *Australian Newspaper Co. v. Bennett*, [1894] A. C. 284.

(x) *Boydell v. Jones* (1838), 4 M. & W. 446.

must bring evidence to establish a slang or cant meaning which he attaches to an apparently innocent word such as "pansy" (y). But even in determining whether the words in their natural and ordinary meaning are defamatory the jury may have regard to the mode and occasion of the publication (z), for example, that they were published in large italicised block type in a popular newspaper (a). "Sometimes a derogatory imputation can be found not so much in what one says as in the way one says it"; for example, in a telegram instead of in a letter (b).

3. When a statement is *prima facie* innocent, the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to it (c). Such an explanatory statement is called an *innuendo* (d).

4. *The colloquium*.—Until the Common Law Procedure Act, 1852, it was necessary for the plaintiff to set out all the special circumstances which rendered the words complained of defamatory and actionable. These introductory averments were known as the colloquium (e). The Act of 1852 "rendered it no longer necessary to set out on the record the facts and the colloquium necessary to support an *innuendo*; they are now only matter of proof on the trial, but the principle remains" (f). "The evidence required is evidence of special facts, causing the words to have a meaning revealed to those who knew the special facts, but not revealed by the words used in the absence of such knowledge" (g). This principle does not seem to be impugned by the decision of the House of Lords in *Tolley v. Fry* (h). In that case an amateur golf champion recovered damages because the defendants, a firm of chocolate manufacturers, had published a caricature of him with

(y) *Thaarup v. Hulton Press* (1943), 169 L. T. 309; *Barnett v. Allen* (1858), 27 L. J. Ex., at pp. 414-5, *per* Bramwell, B. See Fraser, Libel, 15-6.

(z) *Stuart v. Blagg* (1847), 10 Q. B. 906; *Capital and Counties Bank v. Henty* (1882), 7 A. C. p. 744.

(a) *English and Scottish Co-op. Society v. Odhams Press*, [1940] 1 K. B., pp. 452-3.

(b) 52 L. Q. R. 454.

(c) *Cox v. Cooper* (1863), 12 W. R. 75; *Jacobs v. Schmaltz* (1890), 62 L. T. 121.

(d) This term is also sometimes used of the identification of the plaintiff as the person referred to: *supra*, s. 101 (1) n. (w).

(e) On this see Holdsworth, H. E. L., viii, 368-9.

(f) *Per* Lord Blackburn in *River Wear Commissioners v. Adamson* (1877), 2 A. C. p. 763. *Cp. Tolley v. Fry*, [1930] 1 K. B. 467; [1931] A. C. p. 349; *Bruce v. Odhams Press*, [1936] 1 K. B. 697.

(g) *Per* Greer, L.J., in *Tolley v. Fry*, [1930] 1 K. B. p. 480.

(h) [1931] A. C. 333. *Cp. Fraser, Libel*, p. 18, n. (g).

a packet of their chocolate protruding from his pocket, as an advertisement of their goods. The *innuendo* was in effect that he had consented to the use of his portrait as an advertisement for reward and had prostituted his reputation as an amateur golfer. The case was unusual in that the defamatory *innuendo* did not depend on the words used of the plaintiff, but solely upon the circumstances in which the publication took place. The caricature of the plaintiff, innocent itself as a caricature, was embedded in an advertisement.

5. The plaintiff is bound by his own *innuendo* and must prove the meaning as so alleged by him (i). He cannot at the trial fall back upon some other secondary and latent sense, instead of that which he himself alleged in his pleadings (k).

6. When a statement is *prima facie* defamatory, an *innuendo* is not necessary, but is nevertheless admissible. Its use in such a case is to allege a further defamatory significance lying latent in a statement which is itself defamatory in some other respect on the face of it. In such a case it is not necessary to prove the *innuendo* as laid, because, even if the plaintiff fails to prove this, he can fall back upon the primary defamatory sense of the statement (l).

7. *The meaning of defamatory statements.*—In determining whether a statement is defamatory or not, the meaning to be attributed to it is not necessarily the meaning with which the defendant published it, but that which is or may be presumed to be reasonably given to it by the persons to whom it is published. The statement means in law what it naturally and reasonably means for them (m). A defamatory purpose will not make him liable if the statement has for other persons no libellous significance (n); and, conversely, an innocent intention will be no defence for a person who makes a statement which has a defamatory meaning for those to whom he makes it. He is, however, not responsible for a defamatory signification not intended by him but attributed by

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(i) *Tolley v. Fry*, [1930] 1 K. B. p. 484. Compare *Stubbs, Ltd. v. Russell*, [1913] A. C. 386, with *Stubbs, Ltd. v. Mazure*, [1920] A. C. 66.

(k) *Simmons v. Mitchell* (1880), 6 A. C. 156.

(l) *Watkin v. Hall* (1868), L. R. 3 Q. B. p. 402, per Blackburn, J.; *Holdsworth (I. W.), Ltd. v. Associated Newspapers* (1937), 157 L. T. p. 278; *Sim v. Stretch* (1936), 52 T. L. R. p. 671.

(m) *Capital & Counties Bank v. Henty* (1882), 7 A. C. at pp. 745, 772; *Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. p. 168.

(n) *Sadgrove v. Hole*, [1901] 2 K. B. 1.

others to his words, unless these words are reasonably and naturally susceptible to the interpretation put upon them. For perverse misconstruction he is not accountable.

8. *Statements not known to be defamatory.*—Is a person responsible, then, for a statement which he believes to be innocent, but which is in fact defamatory by reason of facts unknown to him but known to the persons to whom he makes it?

To this question the majority of the Court of Appeal gave an affirmative answer in *Cassidy v. Daily Mirror Newspapers* (o). In that case the defendants published a photograph with the following words underneath: "Mr. M. Corrigan, the racehorse owner, and Miss 'X', whose engagement has been announced." When Mr. Corrigan and Miss X posed for the photograph he expressly authorised the photographer to publish it with the announcement of his engagement. The defendants did not know that at the time the plaintiff was, and was known among her acquaintances as, the lawful wife of Mr. Corrigan. The innuendo placed upon these words by the plaintiff was that she was an immoral woman who had cohabited with Corrigan without being married to him, and some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her on that ground as a result of the publication. The jury found that the words did reasonably bear a defamatory meaning, and awarded the plaintiff £500 damages. A majority of the Court of Appeal held that their verdict could not be disturbed. Clearly words about A may indirectly be defamatory of B. For instance, "A is illegitimate" is defamatory of his parents. So to say of A that he is a bachelor may be capable of a defamatory meaning if published to persons who know a lady who passes as Mrs. A and whom A visits. Nor were the defendants saved by the fact that they did not know the facts which enabled some persons to whom the libel was published to draw an inference defamatory of the plaintiff. If a man, said Scrutton, L.J. (p), "publishes words reasonably capable of being read as relating directly or indirectly to A and, to those who know the facts about A, capable of a defamatory meaning, he must take the consequences of the defama-

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(o) [1929] 2 K. B. 331.

(p) [1929] 2 K. B. p. 341. Cp. *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* (1934), 50 T. L. R. 581, and *Morrison v. Ritchie* (1902), 4 F. 645, Ct. of Sess., where a newspaper was held liable for publishing in good faith, without negligence and in the ordinary way of business, a mistaken announcement that the plaintiff had given birth to twins, the fact being that the lady had been only two months married.



tory inferences reasonably drawn from his words". But in another case (*q*) the same learned Judge expressed his opinion that in the absence of evidence of anyone believing that the defamatory words referred to the plaintiff Mrs. Cassidy could not have succeeded in her action. This has now been held by the Court of Appeal not to be the case. In *Hough v. London Express Newspaper, Ltd.* (*r*) it was laid down that where words are capable of being understood in a defamatory sense by persons to whom special facts are known, it is unnecessary to prove more than that there are people who knew the special facts and so might understand the words in a defamatory sense.

Greer, L.J., delivered a dissenting judgment of much force in *Cassidy's Case*. He held that where the words are not *prima facie* defamatory the defendant will only be liable where he knew or ought to have known the facts which rendered the words defamatory. He put the following case as illustrating the difficulties in which the decision in *Cassidy's Case* leaves us: "A being under the mistaken impression that he saw Mr. B walking away from a theatre with Miss C, says next morning to an acquaintance: 'I saw B and C leaving the theatre together last night.' Unknown to A, but to the knowledge of his acquaintance, C had been murdered by the man with whom she left the theatre. Could A be successfully sued by B for saying he had murdered C?" (*s*).

9. *Statements true of some other person.*—In *Newstead v. London Express Newspaper Ltd.* (*t*) it seems to have been accepted by Greene, M.R., that even in the case of statements which are not on their face defamatory, it is not necessarily a defence that the words were true of some other person, but the Master of the Rolls admitted that in such cases there might be serious hardship.

10. *Hulton v. Jones* added, to use the words of Goddard, L.J. (*u*), "a terror to authorship". That terror has been intensified many times by the decisions of the Court of Appeal in *Cassidy's Case*, *Newstead's Case* and *Hough's Case*. It is open to the House

(*q*) *British Russian Gazette v. Associated Newspapers*, [1933] 2 K. B. p. 639.

(*r*) [1940] 2 K. B. 507.

(*s*) For further difficulties see C. K. Allen in 46 L. Q. R. pp. 155—8. The decision in *Cassidy's Case* is supported by Pollock, 46 L. Q. R. 1, and was inevitably followed by Macnaghten, J., in *Ralston v. Ralston*, [1930] 2 K. B. 238, and the Court of Appeal in *Newstead's Case* and *Hough's Case*, though in the latter case (at p. 516) and in *Knupffer v. London Express Newspapers*, [1943] 1 K. B. pp. 89—90, Goddard, L.J., did not disguise his doubts about the decision.

(*t*) [1940] 1 K. B. p. 388.

(*u*) *Knupffer v. London Express Newspapers*, [1943] K. B. p. 89.

of Lords to overrule these three decisions, and, probably (*w*), to put a new interpretation upon *Hulton v. Jones*. It is important that the law should not encourage or throw a shield over irresponsible journalism, but, as the authorities stand to-day, the path is indeed hard for writers of fiction and for the editors and proprietors of newspapers. The present state of the law undoubtedly provides a temptation to speculative and "gold-digging" litigation. And this is the more so because of the heavy damages often awarded by juries in libel actions. MacKinnon, L.J., has told us (*x*) that in his long experience on the Bench he has "been struck by the contrast between the frequent niggardliness of verdicts in cases of personal injury and the invariable profuseness in claims for defamation. A soiled reputation seems assured of more liberal assuagement than a compound fracture".

### § 104. Publication

1. *Publication defined*.—The publication of a defamatory statement means the act of making it known to any person or persons other than the plaintiff himself. It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. A communication to the person defamed himself, however, is not a sufficient publication on which to found civil proceedings (*y*); though it is otherwise in the case of a criminal prosecution (*z*). Nor does a communication between husband and wife amount to publication; domestic intercourse of this kind is exempted from the restrictions of the law of libel and slander (*a*). But a statement by the defendant to the wife or husband of the plaintiff is a ground of action (*b*).

2. *Modes of publication*.—The contents of a written document may be published either by allowing some one to read the document for himself or by reading it out to him. It is submitted, however, that this latter mode of communication amounts to slander only, and not to libel. A defamatory statement may be published by being dictated to a clerk, shorthand writer, or other

(*w*) *Supra*, s. 101 (2) n. (*x*).

(*x*) *Groom v. Crocker*, [1939] 1 K. B. p. 231. But, for a different view, see Lord Atkin in *Ley v. Hamilton* (1935), 153 L. T. p. 386.

(*y*) *Pullman v. Hill*, [1891] 1 Q. B. p. 527.

(*z*) *R. v. Adams* (1888), 22 Q. B. D. 66.

(*a*) *Wennhak v. Morgan* (1888), 20 Q. B. D. 635.

(*b*) *Wennman v. Ash* (1853), 13 C. B. 836.

reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are dicta to the contrary, indeed, in certain cases in which dictation to a clerk is said to be the publication of a libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself (c). If, however, the dictated letter is subsequently published to a third person it is submitted that the dictator would be liable for libel on the ordinary principles of vicarious liability (d).

3. *Newspaper reports*.—Every man is responsible for the publication of a defamatory statement by another with his authority, and for this reason a speaker who knows that his words are being reported for the public press, and who expressly or impliedly sanctions such a publication, can be sued for libel and not merely for slander (e).

4. *Publication by continuance*.—Publication need not consist of a positive or overt act. If a man deliberately refrains from removing or obliterating defamatory matter on premises under his control, he may make himself responsible for its continued presence in the place where it was put. If removal or obliteration was reasonably easy, he will be held to have published it. But he will not be responsible if a stranger has made it impossible or very difficult for him to put an end to the libel, as where the objectionable words have been carved deep into the stone-work of his house (f).

5. *No publication unless defamatory reference to plaintiff understood*.—A publication is not sufficient unless it is made to a person who understands the defamatory significance of the statement, and who also understands that it refers to the plaintiff. Thus, in *Sadgrove v. Hole* (g) the defendant sent to a third person a post-card containing a defamatory statement relating to the plaintiff. The plaintiff's name, however, was not mentioned in it, and no stranger unacquainted with the circumstances would have known

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(c) *Pullman v. Hill*, [1891] 1 Q. B. at pp. 527, 529; *Bozsius v. Goblet Frères*, [1894] 1 Q. B. at p. 844; *Marbé v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K. B. 269. The section in the text was quoted with approval by Slessor, L.J., in *Osborn v. Thomas Boulter & Son*, [1930] 2 K. B. p. 237. Scrutton, L.J., took the same view (at p. 231); Greer, L.J., *contra* (at p. 236).

(d) *Supra*, ss. 24 (1), 34 (25).

(e) *Parke v. Prescott* (1869), L. R. 4 Ex. 169.

(f) *Byrne v. Deane*, [1937] 1 K. B. 818, 839-40.

(g) [1901] 2 K. B. 1.

to whom it referred. It was held that there was no sufficient publication to the postman or other persons through whose hands the postcard passed (*h*).

6. *Publication presumed in certain cases*.—Publication will be presumed, and the burden of disproving it lies upon the defendant, in all cases in which the document is so put in the way of being read and understood by some one that it is probable that he actually read and understood it. Thus, it is a sufficient proof of publication to prove that a letter was posted, and therefore probably read by the person to whom it was addressed or by his clerks; or that a postcard was posted, and therefore probably read by the post-office officials or by the family or servants of him to whom it was sent (*i*); or that a document was printed, and therefore published to the compositors; or that a telegram was despatched, and therefore read by the telegraph operators (*k*).

7. *Unintentional publication*.—Publication need not be intentional, for it is sufficient if it is due to the negligence of the defendant; but an unintentional publication due to no negligence is not actionable (*l*). Thus, a publication to the wrong person by mistake is a ground of action: as when a document is meant to be sent to the plaintiff himself, or to some person privileged to receive it, and it is sent in error to someone else (*m*). So a negligent statement of something not intended to be stated at all is actionable: as in *Shepherd v. Whitaker* (*n*), where the defendants mistakenly inserted in their newspaper the name of the plaintiff's firm under the head of "First meetings under the Bankruptcy Act", instead of under that of "Dissolutions of Partnership". Similarly, the publication of a document which is not known by the defendant to contain the defamatory statement complained of, but which he ought to have known to do so, is a good ground of action. In *Vizetelly v. Mudie's Select Library* (*o*) the defendants were successfully sued for putting in circulation a book containing a passage

(*h*) No action would lie for the publication to the person to whom the card was addressed, since, so far as he was concerned, the communication was privileged. See as to privilege, s. 106, *infra*.

(*i*) *Aliter* in the case of a letter in an unclosed envelope: *Huth v. Huth*, [1915] 3 K. B. 32.

(*k*) *Sadgrove v. Hole*, [1901] 2 K. B. 1; *Warren v. Warren* (1884), 1 C. M. & R. 250.

(*l*) *Cp. Pullman v. Hill*, [1891] 1 Q. B. p. 527, *per* Lord Esher, M.R.

(*m*) *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54.

(*n*) (1875), L. R. 10 C. P. 502.

(*o*) [1900] 2 Q. B. 170.

defamatory of the plaintiff, the jury finding as a fact that the defendants were negligent in not taking any precautions to ascertain the nature of the books issued by them. So in *Sun Life Assurance Co. of Canada v. W. H. Smith & Son* (p) the defendants were held liable for displaying a libellous poster at their bookstalls since their servants, the managers of the bookstalls, were negligent in not knowing that the poster contained a libel. On the other hand, if there is no negligence in such case the innocent disseminator of the defamatory literature is not responsible. In *Emmens v. Pottle* (q), for example, it was held that a newsvendor was not liable for a libel contained in a newspaper sold by him in the ordinary course of business, there being, as the jury found, no knowledge of the existence of the libel nor any negligence in failing to acquire such knowledge.

On the same principle, it is actionable to communicate negligently a statement known to be defamatory, but not intended to be published: as when a man making charges against the plaintiff to him in person or whilst talking scandal to his wife, negligently allows what he says (r) to be overheard by a third person; or when he posts to the plaintiff himself or to a privileged person a defamatory message written on a postcard, instead of in a closed letter (s). So it is actionable to send a defamatory letter to the plaintiff addressed in such a way that in the ordinary course of business it will be opened by the plaintiff's clerks (t). Even the publication of the letter to the defendant's own clerks in the ordinary way of business is sufficient to create liability (u).

On the other hand, if a defamatory letter intended for A is opened and read by B, the writer is not liable if the circumstances are such that he had no reason to anticipate such an event. It is true that he intended publication to A, and would have been liable

(p) (1933), 150 L. T. 211.

(q) (1885), 16 Q. B. D. 354. See also to the same effect *Weldon v. Times Book Co.* (1912), 28 T. L. R. 143 (sale of two French books called "Gounod"); *Bottomley v. Woolworth & Co.* (1932), 48 T. L. R. 521 (American magazines sold by multiple store).

(r) *White v. Stone, Ltd.*, [1939] 2 K. B. 827. But it seems that if he has no reason to suspect that his words will be overheard there is no publication: *S. C.*, at p. 836.

(s) *Sadgrove v. Hole*, [1901] 2 K. B. 1.

(t) *Pullman v. Hill*, [1891] 1 Q. B. 524. Cp. *Sharp v. Skues* (1909), 25 T. L. R. 336.

(u) *Pullman v. Hill*, [1891] 1 Q. B. 524; *Marbé v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K. B. 269. *Aliter* if the occasion is one of privilege. See *infra*, s. 106 (7).

if this intention had taken effect, but there has been no publication by him to B (*w*).

### § 105. Justification

1. *Truth a good defence.*—No action will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true. “For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess” (*x*). And this is so even though the defendant is proved to have been actuated by malicious and improper motives.

2. *Aliter in a criminal prosecution.*—In a criminal prosecution for libel the rule is different. At common law the truth was no defence at all on an indictment; but by the Libel Act, 1843, the publication of the truth, however defamatory, is no longer a criminal offence if the jury is of opinion that the publication of it was for the public benefit. The truth of a matter which does not concern the public is still no defence on a criminal charge, though it is a bar to any civil proceedings.

3. *Burden of proof.*—The defence that the statement is true is termed a plea of justification, the defendant being said to justify the publication. The burden of proof rests upon the defendant; it is for him to prove that the statement is true, not for the plaintiff to prove that it is false (*y*). The defence is a dangerous one, for an unsuccessful attempt to establish it may be treated as an aggravation of the original injury.

4. *Honest belief in truth of statement no defence.*—If the statement is in fact false, it is no defence at all that the defendant honestly and on reasonable grounds believed it to be true. He who attacks the reputation of another does so at his peril; and mistake, however inevitable, is no excuse.

5. *Sufficient if statement substantially true.*—On the plea of justification it is not necessary to prove that the statement is literally true; it is sufficient if it is true in substance. And it is true in substance if the essence of the imputation is true and if the erroneous details in no way aggravate the defamatory character of

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(*w*) *Powell v. Gelston*, [1916] 2 K. B. 615.

(*x*) *McPherson v. Daniels* (1829), 10 B. & C. p. 272.

(*y*) *McPherson v. Daniels* (1829), 10 B. & C. p. 272.

the statement or alter its nature (z). Thus, a statement that the plaintiff had been convicted of travelling in a train without a ticket, and had been fined one pound with *three weeks'* imprisonment in default of payment, was held sufficiently justified by proof that he had been fined one pound for that offence with a *fortnight's* imprisonment in default of payment (a). On the other hand, it is no justification of the statement that the plaintiff is a libellous journalist to prove that he has libelled one man; for the true meaning of the statement in question is that he habitually publishes libels (b).

6. *Statements by way of rumour or report.*—When the defamatory statement is put forward by way of rumour or report only, it is not sufficient justification to prove that the rumour or report really existed; it is necessary to prove that it was true. For to give to it further currency is to suggest that it may be well founded, and it is this suggestion that must be justified. On the same principle it is defamatory and actionable to publish of the plaintiff that he is suspected of some crime or other discreditable conduct; and it is no defence to prove that such a suspicion actually existed. Were it not for this rule every man could escape the consequences of publishing libels and slanders by adopting the simple precaution of stating them as matters of rumour and suspicion, instead of as matters of fact (c). It is apparently not certain whether it is sufficient to justify a statement that a man has been warned off the turf or a boy expelled from school to prove that he has been so warned off or expelled. Greer, L.J., thinks that it is. "It would be an extraordinary result . . . that if you said that a properly constituted tribunal had found a man guilty of some wrongful act you could be sued for libel unless you could prove that the properly constituted tribunal had rightly decided that he was guilty" (d). But persons may be warned off or expelled for a variety of reasons, and it seems possible to place an actionable *innuendo* upon such a statement (e).

(z) *Clarke v. Taylor* (1886), 2 Bing. N. C. 654; *Sutherland v. Stokes*, [1925] A. C. pp. 78—81, *per* Lord Shaw.

(a) *Alexander v. N. E. Ry.* (1865), 6 B. & S. 340.

(b) *Wakley v. Cooke* (1849), 4 Ex. 511.

(c) *Watkin v. Hall* (1868), L. R. 3 Q. B. 396; *McPherson v. Daniels* (1829), 10 B. & C. 263; *Monson v. Tussaud's, Ltd.*, [1894] 1 Q. B. 671.

(d) *Cookson v. Harewood* (1931), [1932] 2 K. B. p. 485. So also Horridge, J., in *Pritchard v. Greyhound Racing Association* (1933), 176 L. T. Jo. 393; 177 L. T. Jo. 90. See, however, Winfield, 299.

(e) *Per* Romer, L.J., in *Chapman v. Lord Ellesmere*, [1932] 2 K. B. p. 475. *Cp. Leyman v. Latimer* (1878), 3 Ex. D. 352 ("convicted felon"). See, however, *infra*, s. 111, n. (z).

## § 106. Privilege

1. *Privilege defined.*—We have seen that in general he who publishes a defamatory statement does so at his peril, and is liable if this statement turns out not to be true, however honestly and carefully he may have acted, and however inevitable his mistake. This rule is subject to a number of important exceptions which are grouped together under the title of Privilege. A privileged statement (f) may be defined as one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his own risk. In other words, privilege includes those exceptional cases in which it is not enough, in order to create liability, to prove that the defendant has published a false and defamatory statement. The defendant, being privileged (f), is not responsible for this alone, but is either wholly free from responsibility or is liable only on proof that he was animated by a malicious motive and not by any genuine intention to use his privilege for the purpose for which the law gave it to him (g).

The cases in which privilege exists are, speaking generally, those in which there is some just occasion for publishing defamatory matter in the public interest or in the furtherance or protection of the rights or lawful interests of individuals. In such cases the exigency of the occasion amounts to a lawful excuse for the attack so made upon the plaintiff's reputation. The right of free speech is allowed wholly or partially to prevail over the right of reputation. For while it is just and reasonable to maintain the rule that he who wantonly and without just and necessary occasion attacks the reputation of another, however honestly, must answer for the actual truth of his words, this rule would be unwarrantably severe in its application to those who, in the performance of public or private duty, or in the legitimate protection of public or private interests, find it necessary to make imputations upon the good name of other persons.

2. *Privilege and justification.*—If the defamatory statement can be shown to be true, the defence of privilege is not required; for it is allowable to publish the truth on all occasions, privileged or not,

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(f) This, though a common expression, is not strictly correct. "The occasion is privileged, the communication is protected": *Adam v. Ward*, [1917] A. C. p. 348, *per* Lord Shaw. "Really it is the occasion which is privileged, though it is natural enough to speak of the privilege as belonging to the defendant who wishes to avail himself of the doctrine": *Minter v. Priest*, [1930] A. C. pp. 571-2, *per* Lord Dunedin.

(g) See *Stuart v. Bell*, [1891] 2 Q. B. p. 345.



and from all motives, good or bad. It is only when the statement is false, or cannot be proved to be true, that it is necessary to fall back upon the plea of privilege, and to prove that the occasion of the publication was such as to exempt the defendant from the consequences of his error. Whenever privilege exists, however, it is wise to plead it instead of or along with a plea of justification; for the latter is a dangerous weapon, which often fails and even injures him who uses it.

3. *Absolute privilege*.—Privilege is of two kinds, distinguished as absolute and qualified. A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false and defamatory it may be, and even though it is made maliciously—that is to say, from some improper motive. The right of free speech is allowed to prevail wholly over the right of reputation. These cases are at the opposite extreme from the ordinary cases of unprivileged defamation. When a statement is not privileged, it is actionable, however honest its publication may have been; but if it is absolutely privileged, it is not actionable, however dishonest its publication may have been. As may be expected, the cases in which the right of free speech can be placed at so high a level are few in number and quite exceptional in character.

4. *Qualified privilege*.—Qualified privilege, on the other hand, exists when the defendant is exempted from the rule of strict liability, not absolutely, but only conditionally on the absence of malice. Malice means in this connection the presence of an improper motive—a purpose to abuse the privilege for some indirect object, instead of a purpose to use it for the end for which the law provides it. Qualified privilege, therefore, is an intermediate case between total absence of privilege and the presence of absolute privilege (*h*).

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(*h*) The exposition of the law of defamation was at one time encumbered by a useless legal fiction known as the doctrine of implied malice. It used to be said that malice was an essential element in all actions for libel and slander, whether the occasion was privileged or not; but that when there was no privilege, malice was conclusively presumed from the mere fact of publication. The existence of privilege, on the other hand, excluded any such presumption. Absolute privilege excluded it conclusively; but when the privilege was qualified merely, it remained open to the plaintiff to prove as a fact that malice existed. Malice which was thus presumed in law was called implied malice, while that which was proved as a fact in cases of qualified privilege was known as express or actual malice. Implied malice has now been eliminated from the law. It is now recognised that malice is no more an essential element in the wrong of defamation than in that of trespass or conversion.

## § 107. Absolute Privilege

1. *Cases of absolute privilege.*—The following statements are absolutely privileged, so that no action will lie in respect of them, however false, defamatory, and malicious they may be :—

- (a) Any statement made in the course of and with reference to judicial proceedings by any Judge, jurymen, party, witness, or advocate;
- (b) Any statement made in Parliament by a member of either House;
- (c) Any statement made by one officer of State to another in the course of his official duty;
- (d) Fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper (i);
- (e) Parliamentary papers published by the direction of either House, and any republication thereof by any person in full.

2. *Judicial privilege.*—“The authorities establish beyond all question this : that neither party, witness, counsel, jury, nor Judge can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies, whether against Judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of Justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them ” (k).

The privilege extends to all Courts, superior and inferior, civil and military (l). But it does not apply to officials possessing

(i) Possibly this is only an instance of qualified privilege: *infra*, s. 107 (5).

(k) *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. 451, *per* Lopes, L.J. *Cp. Rodriguez v. Speyer*, [1919] A. C. p. 90, *per* Lord Atkinson.

(l) *Scott v. Stansfield* (1868), L. R. 3 Ex. 220 (county court); *Thomas v. Churton* (1862), 2 B. & S. 475 (coroner); *Hodson v. Parc*, [1899] 1 Q. B. 455 (justice of the peace); *Dawkins v. Lord Rokeby* (1873), L. R. 8 Q. B. 265 (court-martial); *Law v. Llewellyn*, [1906] 1 K. B. 487 (magistrate); *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306 (official receiver reporting on the winding-up of a company). The same privilege protects statements made before a select committee of Parliament: *Goffin v. Donnelly* (1880), 6 Q. B. D. 307.

merely administrative as opposed to properly judicial functions; and it makes no difference that in the performance of these administrative functions they exercise a judicial discretion. Thus, a meeting of the London County Council engaged in hearing applications for music and dancing licences is not a Court within the meaning of the rule, and statements made by a member of that body are not absolutely privileged (*m*). The privilege extends not merely to Judges (*n*), but witnesses (*o*), parties (*p*), and advocates (*q*). It includes not merely statements made by a witness in Court, but also statements made by him to a party, or to the party's solicitor, in the course of preparation for trial (*r*).

The statement, in order to be privileged, need not be relevant, in the sense of having a material bearing upon the matter in issue in the case. Thus, the statement of a witness is privileged, even though inadmissible as evidence, and even though so immaterial that no prosecution for perjury would be possible in respect of it. Nevertheless the statement, though it need not be relevant in this sense, must, it would seem, be made in the course of and with reference to the case in hand. A Judge who from the bench made a defamatory observation in respect of some entirely extraneous matter would no longer be speaking in his capacity as a Judge, and would have no privilege (*s*).

3. *Parliamentary privilege*.—"It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person" (*t*).

(*m*) *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. 431. Cp. *Attwood v. Chapman*, [1914] 3 K. B. 275 (licensing justices sitting at the general annual licensing meeting); *Collins v. Whiteaway*, [1927] 2 K. B. 378; *Mason v. Brewis Brothers, Ltd.*, [1938] 2 A. E. R. 420 (Court of Referees under Unemployment Insurance Acts, 1920 and 1930); *O'Connor v. Waldron*, [1935] A. C. 76 (Commissioner appointed under the Combines Investigation Act in Canada).

(*n*) *Scott v. Stansfield* (1868), L. R. 3 Ex. 220. In the case of Judges, however, this is simply a special instance of a much more general rule of exemption from civil liability for judicial acts. As to this, see ss. 157 and 158, *infra*.

(*o*) *Seaman v. Netherclift* (1876), 2 C. P. D. 53; *Barratt v. Kearns*, [1905] 1 K. B. 504.

(*p*) *Hodson v. Pare*, [1899] 1 Q. B. 455.

(*q*) *Munster v. Lamb* (1883), 11 Q. B. D. 588.

(*r*) *Watson v. McEwen*, [1905] A. C. 480. See generally Scrutton, L.J., in *More v. Weaver*, [1928] 2 K. B. pp. 521-3. Contrast *Veal v. Heard* (1930), 46 T. L. R. 448.

(*s*) See *Seaman v. Netherclift* (1876), 2 C. P. D. p. 56; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *More v. Weaver*, [1928] 2 K. B. p. 525, *per* Scrutton, L.J.

(*t*) *Ex p. Wason* (1869), L. R. 4 Q. B. p. 576; Bill of Rights, 1689, s. 1.

4. *Official privilege*.—It was decided by the Court of Appeal in *Chatterton v. Secretary of State for India* (u) that an official communication made by the Secretary of State for India to the Under-Secretary for the purpose of enabling the latter to answer a question in the House of Commons was absolutely privileged. "It is not competent to a civil Court", says Lord Esher (w), "to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it." It does not clearly appear, however, what classes of public servants are to be deemed "officials of State" within the meaning of this rule (x). In *Isaacs & Sons v. Cook* (y), Roche, J., held that absolute privilege covered a report by the High Commissioner of Australia in the United Kingdom, made in his official capacity to the Prime Minister of Australia, in which some defamatory statements were made in comparing the methods of sale at the plaintiffs' sale room with those used at Covent Garden. This decision put the Officers of State of a self-governing Dominion on the same footing as Officers of State belonging to the Home Government. The question arises whether privilege would attach to statements made in this country by the officials of a foreign government. It would seem that if such protection were accorded it would be on the grounds of diplomatic privilege, whereas the rule attaching privilege to the communications of our own officials is based on public policy.

The fact that a communication relates to commercial matters does not of itself preclude it from being one relating to State matters (z).

5. *Privileged reports*.—By the Law of Libel Amendment Act, 1888, it is provided that "A fair and accurate report in any newspaper (a) of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged; provided that nothing in this section shall authorise the publication

(u) [1895] 2 Q. B. 189.

(w) [1895] 2 Q. B. p. 191.

(x) As to official communications in military and naval matters, see *Dawkins v. Lord Paulet* (1869), L. R. 5 Q. B. 94.

(y) [1925] 2 K. B. 391. Roche, J., however, refused to lay down the rule that the principle applied to all communications between officials, and left open several debatable questions.

(z) *Isaacs & Sons v. Cook*, [1925] 2 K. B. 391.

(a) As defined in s. 1.

of any blasphemous or indecent matter". "Proceedings" covers anything done in the course of the proceedings which is in any way related to them (b), but not an intervention in Court which is wholly irrelevant to anything before the tribunal (c). It is submitted that the word *privileged* in this section means absolutely privileged, but its interpretation is far from clear (d). If any of the conditions mentioned in this section are absent (e), a report of judicial proceedings falls within the rule of the common law, and possesses at the most a merely qualified privilege (f).

6. *Parliamentary papers*.—By the Parliamentary Papers Act, 1840, absolute privilege is conferred upon the publication by order of either House of Parliament of the reports, papers, votes, or proceedings of either House, and also upon the republication in full of any documents of this nature which have been already published by such authority. At common law the protection accorded to statements made in Parliament did not extend to the publication of defamatory documents elsewhere, even by order of one of the Houses (g); and this Act was passed to alter the law in this respect (h).

7. *Protection of agents*.—If the occasion be covered by absolute privilege then consequential communications also are privileged in the same way. So, in *Isaacs & Sons v. Cook* (i), the publication of the report to the clerks and servants through whom the production and issue of the report were arranged, was privileged along with the report itself (k).

### § 108. Qualified Privilege

1. *Malice defined*.—A statement is said to possess a qualified privilege when, although false and defamatory, it is not actionable

(b) *Farmer v. Hyde*, [1937] 1 K. B. 728.

(c) *Lynam v. Gowing* (1880), 6 L. R. Ir. 259.

(d) See Gatlley, *Libel*, p. 354; Pollock, 217; Winfield, 315-6.

(e) E.g., the privilege does not cover pending litigation: *English and Scottish Co-op. Society v. Odhams Press*, [1940] 1 K. B. p. 458. It is no defence that the omission of a material statement during the proceedings was due to its not being heard by the reporter owing to inattention: *Mitchell v. Hirst, Kidd*, [1936] 3 A. E. R. 872. Lawrence, J., there suggested during argument that it would have been otherwise if the omitted statement could not have been heard. *Sed quare*.

(f) *Infra*, s. 111.

(g) *Stockdale v. Hansard* (1839), 9 A. & E. 1.

(h) The publication of extracts from or abstracts of parliamentary papers is the subject of qualified privilege only: s. 3. See *Mangena v. Wright*, [1909] 2 K. B. 358. As to the publication of defamatory matter at the order or request of the Executive Government, see the Law of Libel Amendment Act, 1888, s. 4.

(i) [1925] 2 K. B. 391.

(k) Cp. cases of qualified privilege, *infra*, s. 108 (7).

without proof of malice. Malice means the presence of an improper motive. A statement is malicious when it is made for some purpose other than the purpose for which the law confers the privilege of making it. "If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive" (l).

2. *Negligence irrelevant*.—It is neither necessary nor sufficient to constitute liability that the statement was made without reasonable and probable cause. Not necessary—for if the statement is made maliciously, and is in fact false, the defendant is liable for it although he had good grounds for believing it to be true; malice destroys the privilege, and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence. Neither is the absence of reasonable and probable cause sufficient in itself to constitute liability. The law requires that a privilege shall be used honestly, but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion is not actionable (m). The unreasonableness of the defendant's belief may, however, amount to evidence of malice (n).

3. *Wilful falsehood*.—The absence of any genuine belief in the truth of the statement is conclusive proof of malice, for the defendant cannot have had a proper motive in saying what he did not believe to be true (o). On the other hand, a genuine belief in the truth of the statement is quite consistent with the existence of malice. A man's motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. If he uses the occasion for a malicious purpose he will be liable, even though he said what he believed to be true: to avoid liability he must have said it for the purpose for which the law allows such statements to be made (p).

(l) *Clark v. Molyneux* (1877), 3 Q. B. D. at p. 246, per Brett, L.J. For similar definitions of malice, see *Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. p. 171; *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. p. 454.

(m) *Clark v. Molyneux* (1877), 3 Q. B. D. 244; *Pittard v. Oliver*, [1891] 1 Q. B. 474; *Moore v. Canadian Pacific S.S. Co.*, [1945] 1 A. E. R. p. 133.

(n) *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. p. 454.

(o) Save, indeed, in those exceptional cases in which a man may be under a duty to make some statement or communication, irrespective of whether he personally believes it to be true or not. His duty may make the truth of the matter no concern of his: *British Rly. Traffic Co. v. The C. R. C. Co.*, [1922] 2 K. B. 260, 271.

(p) *Watt v. Longsdon*, [1930] 1 K. B. 130; *Winstanley v. Bampton*, [1948] 1 A. E. R. p. 664.

4. *Privilege a question of law.*—Whether the occasion upon which a statement is made is privileged is a question for the Judge. The question for the jury is not whether the statement is made upon a privileged occasion, but whether it was made maliciously, so that the privilege was thereby forfeited (*q*). Yet if there is any preliminary question of fact on which this question of law depends, then that fact must be determined by the jury. Thus, it is a rule of law that an accurate report of judicial proceedings is privileged, but it is a question of fact for the jury whether the report is accurate or not (*r*).

5. *Malice a question for the jury.*—The existence of malice is a question of fact for the jury, but the burden of proof lies upon the plaintiff; and the Judge has to be satisfied that there is some reasonable evidence of malice to go to the jury. On a plea of privilege it is not for the defendant to prove that he used his privilege honestly and for its proper purpose; it is for the plaintiff to prove that the privilege was maliciously abused. Since the burden of proof thus rests upon the plaintiff, the question of malice must not be left to the jury, unless the plaintiff has produced reasonable evidence of its existence (*s*).

6. *Evidence of malice.*—Evidence of malice may be either intrinsic or extrinsic. Intrinsic evidence consists in the contents of the statement itself. Its language, for example, may be so violent or insulting—it may go so far beyond the just requirements of the occasion—as to amount in itself to sufficient evidence of malice (*t*).

But when considering whether the actual expressions used can be held as evidence of express malice “no nice scales should be used” (*u*). The defendant will be protected even though his language should be violent or excessively strong, if, having regard

(*q*) *Minter v. Priest*, [1930] A. C. 558.

(*r*) *Adam v. Ward*, [1917] A. C. p. 818, *per* Lord Finlay; *Minter v. Priest*, [1930] A. C. 558.

(*s*) *Jenoure v. Delmege*, [1891] A. C. 73; *McQuire v. Western Morning News*, [1903] 2 K. B. 100; *Clark v. Molyneux* (1877), 3 Q. B. D. 237; *Phelps v. Kemsley* (1942), 168 L. T. 18. But the Judge has a discretion whether he will rule on the matter at the close of the plaintiff's case or whether he will defer ruling until the whole of the evidence has been called: *Marb  v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K. B. 269.

(*t*) *Laughton v. Bishop of Sodor and Man* (1872), L. R. 4 P. C. at p. 505; *Spill v. Maule* (1869), L. R. 4 Ex. 232; *Clark v. Molyneux* (1877), 3 Q. B. D. p. 245.

(*u*) *Adam v. Ward*, [1917] A. C. p. 390, *per* Lord Dunedin; *cp. Gerhold v. Baker*, [1918] W. N. 368, *per* Bankes, L.J.

to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for his purpose, even though in fact it was not so (*w*). Otherwise the protection which the law throws over a privileged occasion would be entirely defeated. It is for the Judge to decide whether the defamatory words are capable from their own nature alone of affording evidence of express malice; for the jury to say whether in that event they do in fact prove express malice (*x*).

Extrinsic evidence consists in the circumstances under which the statement was made—circumstances which go to show that the statement, even though moderate and justifiable in its language, was in reality animated by some improper motive. It is not necessary that the plaintiff should prove affirmatively what this improper motive really was; it is sufficient to disprove the existence of a proper motive: for example, by showing that the defendant had no genuine belief in the truth of the statement (*y*).

7. *Excess of privilege*.—Privilege is forfeited if it is exceeded—that is to say, if the publication of the defamatory statement is more extensive than the occasion of the privilege requires and justifies. Certain forms of privilege, indeed, permit of publication to the whole world: for example, the reports of judicial proceedings. Privilege such as this cannot be exceeded in the sense now under consideration. So, “where a man, through the medium of Hansard’s reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office, he selects the world as his audience, and it is the duty of the heads of the service to which the servant belongs . . . to publish his vindication to the same audience to which his traducer has addressed himself” (*z*). But in other cases the privilege is limited to a publication to certain persons only; it is a right of restricted publication; and any disregard, whether intentional or negligent, of the limits thus imposed is termed an excess of privilege, and deprives the defendant of the benefit of it (*a*). Thus,

(*w*) *Adam v. Ward*, [1917] A. C. p. 839, *per* Lord Atkinson.

(*x*) *Ibid.*, p. 829, *per* Lord Dunedin.

(*y*) *Clark v. Molyneux* (1877), 3 Q. B. D. p. 245; *Marb v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K. B. 269; *Watt v. Longsdon*, [1930] 1 K. B. 180.

(*z*) *Adam v. Ward*, [1917] A. C. p. 843, *per* Lord Atkinson: *cp.* p. 824, *per* Lord Dunedin; p. 347, *per* Lord Shaw.

(*a*) There is another use sometimes made of the phrase “excess of privilege” in which it means not an excessive publication of a privileged statement, but the improper and malicious use of that privilege. In this latter sense evidence of excess means merely evidence of malice.



in *Williamson v. Freer* (b), it was held that a message which would have been privileged had it been sent in a closed letter was unprivileged because sent by telegraph, for it was thereby published to the telegraph operator. Similarly, a publication to a person who is mistakenly believed to be privileged to receive the communication is an excess of privilege which will render the defendant liable (c). "It may be true in one sense to say that newspapers owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the Press to libel public men with impunity would in the absence of malice be almost unlimited" (d). So in *Chapman v. Lord Ellesmere* (e) it was held that *The Times* newspaper was not protected by privilege when it published a decision of the Stewards of the Jockey Club, although it was an accurate report of the decision. The law does not protect a general publication in cases where there is only a sectional interest, and a consequential duty to inform only a part of the public (f).

*No excess if publication reasonably necessary for use of privilege.*—No publication, however, which is reasonably necessary for the effective use of the defendant's privilege amounts to an excess of it. Thus, it has been held that the act of the directors of a company in printing for distribution among the shareholders an auditor's report on the affairs of the company was not an excess of privilege (g). So it has been held that defamatory statements made at a meeting of a board of guardians were privileged, notwithstanding the presence of reporters for the Press (h). Again, in *Edmondson v. Birch & Co.* (i) it was held that a company sending letters and telegrams on a privileged occasion to another company carrying on business abroad was not liable for publishing those letters and telegrams to its own servants in the ordinary way of business. Fletcher Moulton, L.J., said (k): "If a business communication is privileged as being made on a privileged occasion,

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(b) (1874), L. R. 9 C. P. 398.

(c) *Hebditch v. Mellwaine*, [1894] 2 Q. B. 54.

(d) *Chapman v. Ellesmere* (Lord), [1932] 2 K. B. pp. 474-5, *per* Romer, L.J.  
Cp *Standen v. South Essex Recorders* (1934), 50 T. L. R. 365.

(e) [1932] 2 K. B. 431.

(f) *S. C.* at p. 467, *per* Slesser, L.J.

(g) *Lawless v. Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262.

(h) *Pittard v. Oliver*, [1891] 1 Q. B. 474.

(i) [1907] 1 K. B. 371.

(k) *Ibid.*, p. 382.

the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" (l). But in a business communication containing a very serious allegation against a man's character more care ought to be taken in limiting the communication to the higher officials of a firm than in writing an ordinary business letter (m).

8. *Privilege of principal extends to agent.*—The agents through whom a person properly publishes a privileged communication are themselves covered by the like privilege: for example, a printer who prints a privileged document, the printing of which is not an excess of privilege, or a solicitor who in the course of his duty towards his client publishes a statement which his client is privileged to publish (n).

In such cases the privilege of the principal is the privilege of the agent. The agent stands in the shoes of his principal, has the same rights and liabilities (o). Hence the malice of the principal will defeat the privilege so as to involve the agent (p); the malice of the agent on the other hand will not involve him in liability if he be a mere instrument through whose hand the libel passes for publication, and his principal was not guilty of malice (o).

9. *Cases of qualified privilege.*—The chief instances of qualified privilege are the following:—

- (a) Statements made in the performance of a duty;
- (b) Statements made in the protection of an interest;
- (c) Statements made to the defamed person;
- (d) Professional communications between solicitor and client;
- (e) Reports of parliamentary, judicial, and certain other public proceedings.

(l) Since *Bozsius v. Goblet Frères*, [1894] 1 Q. B. 842, and *Edmondson v. Birch & Co.*, [1907] 1 K. B. 371, the earlier case of *Pullman v. Hill*, [1891] 1 Q. B. 524, can be regarded as nothing more than a decision that on the particular facts of the case the communication to the defendants' clerks was not necessary or in the ordinary course of business: *Osborn v. Thomas Boulter & Son*, [1930] 2 K. B. p. 233, per Scrutton, L.J.

(m) *Roff v. British and French Chemical Co.*, [1918] 2 K. B. 677.

(n) *Baker v. Carrick*, [1894] 1 Q. B. 838.

(o) *Adam v. Ward*, [1917] A. C. p. 341, per Lord Atkinson.

(p) *Smith v. Streetfield*, [1918] 3 K. B. 764; *Adam v. Ward*, [1917] A. C. p. 331, per Lord Dunedin. Salmond doubted the correctness of the former decision. It certainly is "hard law" but seems consistent with principle. See *Evatt, J.*, in *McKernan v. Fraser* (1931), 46 C. L. R. p. 406. Cf. *Crozier v. Wishart Books, Ltd.*, [1936] 1 K. B. 471; *Moore v. Canadian Pacific S.S. Co.*, [1945] 1 A. E. R. p. 134. Newspapers may be an exception to the rule, *vide infra*, s. 114 (10).

### § 109. Statements in Performance of Duty

1. *Duty to make a statement.*—A statement is conditionally privileged if it is made in the performance of any legal or moral duty imposed upon the person making it (q), provided that the person to whom the statement is made has a corresponding interest or duty to receive it. This reciprocity is essential (1). “This is not to say that both parties must have a duty or both an interest: one may have an interest and the other a duty, as in the common case of a servant’s character” (s).

The duty need not be, and indeed seldom is, one enforceable at law (ss); it is sufficient that by the moral standard of right conduct prevalent in the community the defendant lay under an obligation to say what he did. It is not enough that he believed himself to be under such an obligation. “The question is, what is the defendant’s duty, not what he thinks to be his duty” (t). “Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?” is the test suggested by Greer, L.J. (u). It is for the Judge, and not for the jury, to decide whether on the facts as proved such a duty existed (v).

2. *Answering inquiries.*—“The circumstances that constitute a privileged occasion can themselves never be catalogued” (w), but one important kind of duty which will give privilege to a defamatory statement is the duty of answering inquiries made by some person having a lawful interest in the matter. Thus, an employer may answer questions as to the character of a former servant made by any person proposing to engage that servant (x). So one trader may answer the inquiries of another as to the solvency

(q) *Toogood v. Spyring* (1834), 1 C. M. & R. 181; *Stuart v. Bell*, [1891] 2 Q. B. 341.

(r) *Adam v. Ward*, [1917] A. C. p. 334, per Lord Atkinson; *Watt v. Longsdon*, [1930] 1 K. B. 130. Contrast *Myroft v. Sleight* (1921), 90 L. J. K. B. 888.

(s) *Phelps v. Kemsley* (1942), 168 L. T. p. 21, per Goddard, L.J.

(ss) An example of a duty enforceable by law is the duty imposed by s. 228 of the Merchant Shipping Act, 1894, on the master of a ship to record in the log any case where he leaves a seaman behind and the reason: *Moore v. Canadian Pacific S.S. Co.*, [1945] 1 A. E. R. 128, 133.

(t) *Whiteley v. Adams* (1863), 15 C. B. (N.S.) p. 412. See also *Stuart v. Bell*, [1891] 2 Q. B. 341.

(u) *Watt v. Longsdon*, [1930] 1 K. B. p. 153.

(v) *Watt v. Longsdon*, [1930] 1 K. B. 130.

(w) *London Association for Protection of Trade v. Greenlands*, [1916] 2 A. C. p. 22, per Lord Buckmaster.

(x) *Jackson v. Hopperton* (1864), 16 C. B. (N.S.) 829.

of a third with whom the second proposes to do business (y). So an accusation of crime is privileged if made in reply to questions put by the police with a view to detecting an offender (z).

3. *Volunteered statements.*—A communication which is volunteered, without any inquiry on the part of any one possessing a lawful interest, is unprivileged, unless there is some such confidential or other relation between the parties as creates a duty to speak without being asked. Thus, the relation of master and servant will justify the servant in telling his master facts which concern his interest in relation to the matters intrusted to the servant (a). For the same reason a father or other near relative may warn a lady as to the character of the man whom she proposes to marry (b). And it would seem that there may be circumstances in which a duty lies upon a third party to communicate to one spouse the delinquencies of the other, but in such cases the Judge, as Scrutton, L.J., said in *Watt v. Longsdon* (c), would be "much influenced by the consideration that as a general rule it is not desirable for any one, even a mother-in-law, to interfere in the affairs of man and wife". Again, a host owes a duty to his guest which will justify him in warning his guest against a servant suspected of dishonesty (d). So the members of borough councils and other public bodies and officials of trading companies are privileged in respect of communications made to one another in the honest fulfilment of their functions (e). On the same principle, in the case of a trade protection association whose business it is to make on behalf of its members inquiries into the financial position of persons with whom they propose to deal, communications made by the association or its agents to a member who has requested this information, and who has a lawful interest in obtaining it, are privileged (f).

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(y) *Robshaw v. Smith* (1878), 38 L. T. 423.

(z) *Kine v. Sewell* (1898), 3 M. & W. 297.

(a) *Lawless v. Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262; *Cooke v. Wildes* (1855), 5 E. & B. 328.

(b) *Todd v. Hawkins* (1837), 8 C. & P. 88.

(c) [1930] 1 K. B. 130.

(d) *Stuart v. Bell*, [1891] 2 Q. B. 341.

(e) *Andrews v. Nott Bower*, [1895] 1 Q. B. 888; *Watt v. Longsdon*, [1930] 1 K. B. 130.

(f) *London Association for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A. C. 15. It seems impossible to reconcile this decision with the earlier decision of the Privy Council in *Macintosh v. Dun*, [1908] A. C. 390. "If a trader", says Lord Parker in the former case, at p. 44, "is justified in making inquiries through an agent on a proper occasion as to the credit of another, it can make no difference whether the agent receives, or does not receive, a remuneration for his services." It is not easy to see, therefore, why the agent should not be an

### § 110. Statements in the Protection of an Interest

1. *Interest in making a statement.*—Even when there is no duty to make the statement, it is nevertheless privileged if it is made in the protection of some lawful interest of the person making it (g) : for example, if it is made in the defence of his own property or reputation. But here also there must be reciprocity. There must be an interest to be protected on the one side and a duty to protect it on the other (h). So a letter written by the creditor of a naval officer to his commanding officer to secure payment of his debt is privileged because commanding officers in His Majesty's forces have an interest in seeing that officers serving under them do not incur debts which they are unable or unwilling to discharge (i). There may sometimes be a common interest in and reciprocal duty in respect of the subject-matter of the communication (k).

2. *Private interest.*—Thus, a master has a sufficient interest in the honesty of his servants to be privileged in warning them against the character of their associates (l). So a tenant may make a complaint to his landlord of the conduct of persons engaged by the latter to effect repairs to the premises (m). Conversely, a landlord may complain to his tenant of the conduct of the latter's lodgers as having a tendency to bring the house into disrepute (n). So joint owners of property, or partners in the same business, or shareholders in the same company, may make privileged communications to each other in defence and furtherance of their common interests (o).

2. *Public interest.*—The same principle is applicable even when the interest of the defendant is merely the general interest which he possesses in common with all others in the honest and efficient

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incorporated company established for the purpose of making such inquiries and conducting them for commercial profit, or why such a company in so acting should not possess the same privilege as any other agent engaged for the same purpose. Cp. *Watt v. Longsdon*, [1930] 1 K. B. p. 148, *per* Scrutton, L.J.

(g) See Lord Greene, M.R., in *De Buse v. McCarthy*, [1942] 1 K. B. p. 164.

(h) *White v. Stone, Ltd.*, [1939] 2 K. B. p. 835.

(i) *Winstanley v. Bampton*, [1943] 1 K. B. 319. See also *Smythson v. Cramp & Sons*, [1943] 1 A. E. R. p. 326. It is, however, impossible by making a mistake to create the occasion for making a privileged statement: *Davidson v. Barclays Bank* (1940), 164 L. T. 25.

(k) *Watt v. Longsdon*, [1930] 1 K. B. p. 147, *per* Scrutton, L.J.

(l) *Somerville v. Hawkins* (1851), 10 C. B. 583; *Hunt v. Gt. N. Ry.*, [1891] 2 Q. B. 169.

(m) *Toogood v. Spyring* (1834), 1 C. M. & R. 181. Cp. *Osborn v. Boulter*, [1930] 2 K. B. 226.

(n) See *Knight v. Gibbs* (1834), 1 A. & E. 43.

(o) *Lawless v. Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262; *Quarts Hill Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501.

exercise by public officials of the duties intrusted to them. Thus, any member of the public may make charges of misconduct against any public servant, and the communication will be privileged (*p*); but the charge must be made to the proper persons—that is to say, to those who have a corresponding interest. So a constituent may write to his Member of Parliament asking for his assistance to bring to the notice of the appropriate Minister a complaint of improper conduct on the part of a public officer, for example, a police officer or a Justice of the Peace, acting in his constituency in relation to his office (*q*). A communication to the wrong person (*r*), and *a fortiori* a publication of the complaint to the world at large in a newspaper or otherwise, is an excess of privilege, and the privilege will be thereby forfeited (*s*).

3. *Privilege distinguished from fair comment.*—This privilege of making complaints against public officials must not be confounded with the right to make fair comments on matters of public interest, which will be discussed in the succeeding section (*t*). Privilege deals with false and defamatory statements of fact, not with defamatory comment on proved or admitted facts. A comment may be published to all the world; a specific charge of misconduct may be published only to the persons in authority over the offender.

### § 111. Privileged Reports

1. *Judicial reports.*—Fair and accurate reports, whether in a newspaper or elsewhere, of the public proceedings of any Court of Justice are conditionally privileged by the common law. The privilege extends to all Courts, whether superior or inferior, and whether Courts of record or not. It makes no difference whether the proceedings are preliminary or final, or whether they are taken *ex parte* or otherwise (*u*). The privilege is not excluded by the fact that the matter was one over which the Court had no juris-

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(*p*) *Harrison v. Bush* (1855), 5 E. & B. 844.

(*q*) *R. v. Rule*, [1937] 2 K. B. 375.

(*r*) *Cp. De Buse v. McCarthy*, [1942] 1 K. B. 156 (publication by borough council to ratepayers of agenda containing charges to be investigated against employees).

(*s*) *Purcell v. Sowler* (1878), 2 C. P. D. 215. But see *Davis v. London Express Newspaper* (1938), 55 T. L. R. 207.

(*t*) *Infra*, s. 114. See *Standen v. South Essex Recorders* (1934), 50 T. L. R. 365.

(*u*) So a fair and accurate report of a charge to the grand jury was protected, though only the witnesses for the prosecution were heard: *R. v. Evening News*, [1925] 2 K. B. 158

diction (*w*). It seems, however, that if the Court has prohibited the publication of its proceedings, no privilege attaches to a publication in violation of that prohibition (*x*), nor does the privilege attach if the proceedings take place in a Court to which the public are not admitted (*y*), or in a domestic tribunal, *e.g.*, the stewards of the Jockey Club (*z*), nor where the subject-matter of the publication is an obscene or blasphemous libel (*a*).

As has been already indicated (*b*), a *newspaper* report of judicial proceedings is the subject of a statutory privilege, probably absolute, if it fulfils the requirements of section 3 of the Law of Libel Amendment Act, 1888. If any of those requirements are not satisfied, the report is subject to the common-law rule of qualified privilege only.

2. *Parliamentary reports*.—Fair and accurate reports of parliamentary debates are covered by qualified privilege at common law (*c*), whilst the publication of extracts from or abstracts of reports or papers ordered by Parliament to be published is the subject of qualified privilege by statute (*d*).

3. *Reports of public meetings*.—At common law the reports, whether in a newspaper or elsewhere, of the proceedings of public meetings possess no privilege (*e*). It is now provided, however, by section 4 of the Law of Libel Amendment Act, 1888, that fair and accurate reports in a newspaper of the proceedings of any public meeting (*f*), or of any of the other kinds of meetings referred to in that section (*g*), shall be conditionally privileged, provided that the

(*w*) See, on the whole matter, *Usill v. Hales* (1878), 3 C. P. D. 319; *Kimber v. Press Association*, [1893] 1 Q. B. 65; *Macdougall v. Knight* (1889), 14 A. C. 194. Cp. *Allbutt v. General Council of Medical Education* (1889), 23 Q. B. D. 400.

(*x*) See Odgers on Libel, p. 314, 5th ed.

(*y*) *Kimber v. Press Association*, [1893] 1 Q. B. 65; *Lewis v. Levy* (1858), E. B. & E. p. 558, *per* Lord Campbell, L.C.J.

(*z*) *Chapman v. Ellesmere (Lord)*, [1932] 2 K. B. p. 475, *per* Romer, L.J. But privilege attaches to the publication of a decision of such a tribunal, in the terms in which the tribunal *bona fide* embodied it, in the publication chosen by the parties as the means of communication between the tribunal and the section of the public interested. This is merely an application of the rule *volenti non fit injuria*: *supra*, s. 8 (1). In such a case the plaintiff cannot rely upon an innuendo: *S. C.*, [1932] 2 K. B. 481. Cp. *supra*, s. 105 (6).

(*a*) *R. v. Mary Carlile* (1819), 3 B. & Ald. 167.

(*b*) *Supra*, s. 107 (5).

(*c*) *Wason v. Walter* (1868), L. R. 4 Q. B. 73.

(*d*) *Supra*, s. 107 (6) n. (*h*).

(*e*) *Purcell v. Sowter* (1877), 2 C. P. D. 215.

(*f*) A public meeting is defined as "any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted".

(*g*) Such as meetings of a vestry, town council, school board, board of guardians, to which the public or newspaper reporters are admitted.

matter published is of public concern and the publication of it is for the public benefit (h).

4. *Publication of contents of public records.*—The publication, whether in a newspaper or elsewhere, of correct copies of or extracts from any judicial or official records which are by statute open to public inspection is the subject of conditional privilege at common law (i). Thus a trade-protection journal is entitled to publish extracts from the public registers of bills of sale, County Court judgments, or appointments of receivers under the Companies Act, and is not responsible, in the absence of malice, for any error in the register or for any defamatory suggestion that may be contained in the matter so extracted.

### § 112. Communications Made to the Person Defamed

Communications made to the person defamed himself are not actionable (k), not because they are privileged but because, since they are not published to a third person, the plaintiff has suffered no loss of reputation. They are not actionable however ill-founded, however malicious. But if such a statement is made in the presence of a third person or if a written communication is seen by a third person the publication and the loss of reputation necessary to found an action are supplied. So in *White v. Stone, Ltd.* (l), the defendant was overheard by third persons whilst charging his servant with dishonesty, and it was held by the Court of Appeal that this was not a privileged occasion. "The privileged occasion", it was said (m), "can only arise when the publication is made to a person, other than the plaintiff, to whom the speaker has a duty or interest to make it, and that hearer has a corresponding interest or duty to receive it." In that case it seems to have been recognised (n) that if the defendant had had no reason to suspect that he would be overheard there would have been no publication to found an action.

But even if there is publication it is not always that an action

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(h) Whether in a particular case publication is for the public benefit or not is a question for the jury: *Sharman v. Merritt* (1916), 82 T. L. R. 360. The Act does not authorise the publication of any blasphemous or indecent matter; nor does it protect the defendant if he fails on request to insert a contradiction or explanation of the report complained of.

(i) *Fleming v. Newton* (1848), 1 H. L. C. 363; *Searles v. Scarlett*, [1892] 2 Q. B. 56, *Jones v. Financial Times* (1909), 25 T. L. R. 677.

(k) *Supra*, s. 104 (l).

(l) [1939] 2 K. B. 827.

(m) At p. 885.

(n) At p. 886. *Vide supra*, s. 104 (7).



will lie. In *Taylor v. Hawkins* (o) the defendant, in order to have a witness, called in a third party to hear him accuse his servant of dishonesty when dismissing him on that ground. The Court held that he had done no more than a prudent and honourable man ought to have done, and that he was not liable for slander in the absence of malice. The statement to the servant was privileged, and the privilege was not taken away by the presence of a third person. Again in *Boësius v. Goblet Frères* (p) it was held that a solicitor writing a defamatory letter to the plaintiff on behalf of his client does not exceed and forfeit his privilege by publishing the letter in the ordinary course of business to his clerks.

It is submitted that, though the rule has not yet been so stated, a close examination of the authorities shows the true rule of law to be as follows: Where a defamatory statement is made to the person defamed himself a qualified privilege covers any publication of that statement to third persons which is made in the reasonable and usual course of business or which is such as a reasonable and honourable man would naturally have made in his own interest (q).

### § 113. Professional Communications

Confidential communications between solicitor and client are privileged. The foundation of the privilege is the importance in the interests of justice that such communications should be free and unfettered by any fear of the consequences (r). The privilege is limited to the legal profession and covers all professional communications passing for the purpose of getting or giving professional advice (s), and exists even if the solicitor does not accept the retainer (t). But it is not confined to litigation: even conversations between a solicitor and client relating to the business of obtaining a loan for the deposit on the purchase of real estate are

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(o) (1851), 16 Q. B. 308. The Court also thought that the master had an interest in making the communication, but there does not seem to have been that reciprocity of interest or duty which is now held to be essential, *supra*, s. 110 (1). Similarly, in *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181, in which case Parke, B., gave his classic exposition of the nature of a privileged occasion, the Court held that, when the defendant charged the plaintiff, who was employed by him, in the presence of a third person with having got drunk and broken open his cellar door, the occasion was privileged.

(p) [1894] 1 Q. B. 842, 846. So also *Osborn v. Thomas Boulter & Son*, [1930] 2 K. B. p. 234.

(q) If the above statement of the law is correct, there is no such conflict between *White v. Stone* and *Osborn v. Thomas Boulter & Son* as Goodhart suggests in 56 L. Q. R. p. 265. See also Winfield, 322.

(r) *Minter v. Priest*, [1929] 1 K. B. p. 675, *per* Lawrence, L.J.

(s) *S. C.*, [1930] A. C. p. 681, *per* Lord Atkin.

(t) *S. C.*, [1929] 1 K. B. 655; [1930] A. C. 558.

covered by the privilege, as the business is professional business within the ordinary scope of a solicitor's employment (t). It is probable that this is an instance of qualified, not absolute, privilege, though in *More v. Weaver* (u), where the plaintiff was not represented by counsel, the Court of Appeal held it to be absolute. But in *Minter v. Priest* the House of Lords expressly reserved opinion upon the point, and Lord Atkin (x) clearly expressed his doubts of the earlier decision, whilst in *Groom v. Crocker* (y) the privilege was throughout treated by the Court of Appeal as qualified. The privilege of non-disclosure of such communications is the privilege of the client, and not of the solicitor. If the client chooses to withdraw the veil, the communications are then available as evidence, and it may be, as apparently suggested (z) by Lord Warrington in *Minter v. Priest*, that, whereas the client's privilege is absolute, that of the adviser is only qualified.

### § 114. Fair Comment

1. *Fair comment*.—A fair comment on a matter which is of public interest or is submitted to public criticism is not actionable.

2. *Distinguished from statements of fact*.—Comment or criticism must be carefully distinguished from a statement of fact. The former is not actionable if it relates to a matter which is of public interest; the latter is actionable, even though the facts so stated would, if true, have possessed the greatest public interest and importance. "It is one thing to comment upon or criticise even with severity the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct" (a). "Comment in order to be fair must be based upon facts, and if a defendant cannot show that his comments contain no misstatements of fact he cannot prove a defence of fair comment" (b).

Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's writings or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by the law to justify

(u) [1928] 2 K. B. 520. Approved by Fraser, Libel, p. 128.

(x) *Minter v. Priest*, [1930] A. C. p. 586.

(y) [1939] 1 K. B. 194, 206, 226, 231. See also Winfield, 312-3.

(z) *Minter v. Priest*, [1930] A. C. p. 578.

(a) *Davis v. Shephstone* (1886), 11 A. C. p. 190.

(b) *Digby v. Financial News*, [1907] 1 K. B. 502, per Collins, M.R., p. 507.  
Cp. *Peter Walker & Son, Ltd. v. Hodgson*, [1909] 1 K. B. p. 256, per Kennedy, L.J.

it as being true, but is allowed to express it, even though others disagree with it, provided that it is fair and honest.

3. *Form of plea of fair comment.*—In view of the distinction thus drawn between comment and matter of fact, and in view of the circumstance that comment and fact are so frequently combined in the same statement, the plea of fair comment used to be so formulated as to justify at the same time the statements of fact so included in the allegations complained of. The usual form of such a plea was that “in so far as the statements complained of are statements of fact they are true in substance and in fact, and in so far as they consist of comment they are fair comment on a matter of public interest”. Such a plea, known as the “rolled-up” plea, was a plea of fair comment only, and not of justification coupled with a plea of fair comment (c). “The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated, but also that any comments upon them are correct” (d). But this plea was not regarded by the Courts with favour (e). It “was an attempt to get the moral advantage of pleading justification without undertaking the legal burden of specifically proving the statements averred to be true” (f). It was to be hoped that its condemnation in *Sutherland v. Stokes* (g) was final, yet it is still in practice regularly inserted in pleadings (h).

4. *Comment and privileged statements of fact.*—If a statement of fact is itself privileged, and the subject-matter is one which is open to comment, the plea of fair comment is not excluded by the circumstance that the statement of fact on which the comment proceeds is erroneous. For example, he who comments on the statement contained in the judgment of a Court of Justice or in a parliamentary paper may plead fair comment, although the statements are mistaken (i).

(c) *Sutherland v. Stokes*, [1925] A. C. 47.

(d) *Sutherland v. Stokes*, [1925] A. C. pp. 62—63, *per* Lord Finlay.

(e) *Sutherland v. Stokes*, [1925] A. C. pp. 76, 99, *per* Lord Shaw and Lord Carson; *Aga Khan v. Times Publishing Co.*, [1924] 1 K. B. 675. See also *Tudor-Hart v. British Union for the Abolition of Vivisection*, [1938] 2 K. B. 229.

(f) Pollock, 41 L. Q. R. 126.

(g) [1925] A. C. 47.

(h) A precedent appears in Fraser, *Libel*, p. 818.

(i) *Mangena v. Wright*, [1909] 2 K. B. 958.

5. *Comment must appear to be such on its face.*—It is essential to the plea of fair comment that the defamatory matter must appear on the face of it to be a comment and not a statement of fact. If the statement is ambiguous in this respect, it must be justified. To state barely that the plaintiff has been guilty of negligence or incompetence in some public office held by him must be justified as a statement of fact, even though intended as a comment upon facts. To come within a plea of fair comment the facts on which the comment is based must be stated or referred to, and the inference of negligence or incompetence must appear as an expression of the defendant's opinion on those facts (*k*).

6. *What matters may be commented on.*—The right of comment is universal; there is full liberty to criticise all men and things, public and private, provided that the criticism is true. But it is only in a limited class of cases that there is any right to express one's own opinion honestly and fearlessly regardless of whether others can be induced to agree with it or not. The cases in which this right exists may be divided into two classes—namely (1) matters of public interest; and (2) matters which, although of no public interest, have been submitted to criticism by the persons concerned. In all other cases the defendant will be liable unless he can prove that "the libel is true not only in its allegations of fact but also in any comments made therein" (*l*). He must justify both the facts and the comment.

(a) *Matters of public interest*: for example, the administration of justice, the affairs of Parliament, the conduct of the executive Government and of public servants, the mode in which local authorities and other public bodies perform their functions, the management of public hospitals and other public institutions, the conduct of public worship in the Church of England. It makes no difference that the public interest of the matter in question is limited to a particular locality, instead of extending throughout the

(*k*) *Burton v. Board*, [1929] 1 K. B. 301; *Hunt v. Star Newspaper Co.*, [1908] 2 K. B. p. 320, *per* Fletcher Moulton, L.J.

(*l*) *Per* Lord Finlay in *Sutherland v. Stopes*, [1925] A. C. p. 62. "True comment" presumably means comment which in the opinion of the Court is warranted by the facts and well-founded. But as Harper points out (1 *Toronto L. J.* 397) "it is obviously impossible to demonstrate either the truth or the falsity of what is merely the expression of an opinion as distinguished from a statement or implication of fact".

realm. That which is primarily of public interest to the citizens of Manchester is indirectly of public interest to all England (m) (n).

(b) *Matters submitted to public criticism by the persons concerned.* He who voluntarily gives up his right of privacy by submitting himself or his deeds to public scrutiny and judgment must submit to the exercise of a right of public comment. This right, therefore, extends to books and every form of published literature, works of art publicly exhibited, and public musical or dramatic performances. So also with any form of appeal to the public, such as advertisements, circulars, or public speeches (o). So it would seem that, whilst men in public life have to submit to being caricatured, persons in private life are protected from this form of annoyance (p).

7. *Comment on moral character.*—A man's moral character is not a permissible subject of adverse comment, and this is so even though the person attacked occupies some public position which makes his character a matter of public interest. He who says or suggests that a person is dishonest, corrupt, immoral, untruthful, inspired by base and sordid motives, must justify his accusation by proving it to be true (q). It may be fair comment mistakenly to accuse a man of folly, but not to accuse him of vice; of want of dignity, but not of want of honesty; of incapacity, but not of corruption; of bad taste, but not of mendacity. This important limitation upon the right of criticism was established by the decision

(m) *Purcell v. Sowler* (1877), 2 C. P. D. p. 218; *Cox v. Feeney* (1863), 4 F. & F. p. 20.

(n) The following are examples of matters of public interest: *Henwood v. Harrison* (1872), L. R. 7 C. P. 606 (report of Board of Admiralty on the plans of a naval architect); *Wason v. Walter* (1868), L. R. 4 Q. B. 73 (petition to Parliament for removal of a Judge); *Davis v. Duncan* (1874), L. R. 9 C. P. 896 (conduct of a meeting assembled to hear election address); *Hibbins v. Lee* (1864), 4 F. & F. 243 (conduct of magistrates); *Purcell v. Sowler* (1878), 2 C. P. D. 215 (administration of the poor law); *Kelly v. Tinning* (1865), L. R. 1 Q. B. 699 (conduct of public worship); *Leng v. Langlands* (1916), 114 L. T. 665 (conduct of an architect to a school board). In *South Hetton Coal Co. v. N. Eastern News Association*, [1894] 1 Q. B. 133, it was held by the Court of Appeal that the sanitary condition of the cottages provided by a colliery company for its workmen was a matter of public interest, comment on which was privileged. See also *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292.

(o) *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Merivale v. Carson* (1887), 20 Q. B. D. 275; *McQuire v. Western Morning News*, [1903] 2 K. B. 100; *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

(p) *Contrast Carr v. Hood* (1808), 1 Camp. 354 n., with *Du Bost v. Beresford* (1810), 2 Camp 511, and *Dunlop Rubber Co. v. Dunlop*, [1920] 1 Ir. R. 280; [1921] 1 A. C. 367.

(q) But the "private life of a Member of Parliament may be material to his fitness to occupy his public office": *Lyle-Samuel v. Odhams, Ltd.*, [1920] 1 K. B. p. 146, *per* Scrutton, L.J.

of the Court of Queen's Bench in *Campbell v. Spottiswoode* (r), in which it was held actionable to suggest, however honestly, that the editor of a religious magazine, in advocating a scheme for missions to the heathen, was in reality an impostor inspired by motives of pecuniary gain. "A writer in a public paper," said Cockburn, C.J. (s), "may comment on the conduct of public men in the strongest terms; but if he imputes dishonesty, he must be prepared to justify. . . . It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest, and wicked motives unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause."

This distinction between comment which does and comment which does not amount to a personal attack upon the moral character of the plaintiff has been recognised by the Court of Appeal in *Hunt v. The Star Newspaper Co.* (t) and by the House of Lords in *Dakhyl v. Labouchere* (u).

Such a personal attack, therefore, is to be regarded as a defamatory statement of fact, and not as a mere comment. Accordingly it will not be covered by a plea of fair comment, unless it is a correct inference from the facts commented on. It is not a sufficient defence (as in other forms of defamatory comment) that the statement has been honestly, even though erroneously, made as a fair comment on a matter of public interest; but it is a good defence under a plea of fair comment (without any separate plea of justification) that the statement is a correct inference warranted by the facts commented on. "A personal attack," says Lord Atkinson in *Dakhyl v. Labouchere* (w), "may form part of a fair comment upon given facts truly stated, if it be warranted by those facts; in other words, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it

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(r) (1863), 3 B. & S. 769. See also *Parmiter v. Coupland* (1840), 6 M. & W. 105; *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292.

(s) 32 L. J. Q. B. pp. 196, 199.

(t) [1908] 2 K. B. 309.

(u) *Ibid.*, 325, n.

(w) [1908] 2 K. B. p. 829.

purports to be a comment is a matter of law for the determination of the Judge before whom the case is tried; but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." "Any other interpretation," said Fletcher Moulton, L.J., in *Hunt v. The Star Newspaper Co.* (x), "would amount to saying that where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law."

8. *Comment must be fair.*—The comment must be *fair*, otherwise it will be actionable as unprivileged. This does not mean that the comment must be true; true comment needs no privilege any more than any other true statement. "The jury," says Collins, M.R., in *McQuire v. Western Morning News* (y), "have no right to substitute their own opinion of the literary merits of the work for that of the critic, or try the fairness of the criticism by any such standard. Fair, therefore, in this collocation certainly does not mean that which the ordinary man, 'the man on the Clapham omnibus', as Lord Bowen phrased it, the jurymen common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility" (z).

9. Fair comment means comment honestly believed to be true, and not inspired by any malicious motive (a). "A comment which may be objectively and *prima facie* fair may become unfair if made with a malicious motive" (b). The absence of any genuine belief in the truth of the comment is conclusive proof of

(x) [1908] 2 K. B. p. 320.

(y) [1908] 2 K. B. p. 109.

(z) Scrutton, J., in *The Homing Pigeon Publishing Co. v. The Racing Pigeon Publishing Co.* (1913), 29 T. L. R. 389, discovered a difference in point of view between *Hunt v. The Star Newspaper Co.* (*supra*) and *McQuire's Case*. It would seem, however, that, if the attack is upon a man's moral character, the facts truly stated must warrant the imputation, the inference must be correct; if, on the other hand, the attack is a criticism upon a literary work, the inference need only be an honest and reasonably possible inference. Scrutton, L.J., again seems to miss this distinction in *Burton v. Broad*, [1929] 1 K. B. p. 304. It may well be that the man who submits his artistic work for criticism comes within the ambit of the maxim *volenti non fit injuria*. But see Fraser, Libel, pp. 110—2.

(a) *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; *McQuire v. Western Morning News*, [1908] 2 K. B. 100.

(b) *Lyle-Samuel v. Odhams*, [1920] 1 K. B. p. 149, *per* Scrutton, L.J.

malice, for no man can have a proper motive for making defamatory statements which he does not believe to be justified. Even a comment genuinely believed to be true, however, will be actionable as unfair if it is inspired by any improper and malicious motive.

10. *Effect of malice of writer on printer.*—We have seen (c) that the printer of a privileged document will not be protected if the writer was actuated by malice. Does the same rule apply to the printer of comment on a matter of public interest? It is submitted that it does except in the case of newspapers. In the ordinary case of a libellous statement made upon the faith of information gathered from third parties discovery will be granted of the names of the defendant's informants, for it is relevant on the issue of malice to know from what particular persons the defendant obtained the information on which he relied (d). But by a special rule of law a newspaper will not, except in very special circumstances, be compelled to make discovery of its informants (e). Scott, L.J., is of opinion that it follows that the malice of the writer of a letter published in the newspaper will not affect the newspaper's defence of fair comment if the letter in its general tenor appears fair (f). But this would seem a *non sequitur*. If malice is proved without recourse to discovery there is no logical reason why the publishers of a newspaper should not be subject to the liabilities of any other printer, and the publishers of a newspaper were the defendants in *Thomas v. Bradbury, Agnew & Co. Ltd.* (g) itself. In any event, this exceptional immunity of newspapers does not extend to the writers of letters published in them—they are not “within the umbrella of the newspaper” (h).

11. *Immoderate comment.*—It is sometimes said that comment is also to be classed as unfair, even in the absence of any dishonesty or malice, if the critic fails to show a certain degree of moderation,

(c) *Supra*, s. 108 (8).

(d) *White & Co. v. Credit Reform Association*, [1905] 1 K. B. 658.

(e) *Hennessy v. Wright* (No. 2) (1888), 24 Q. B. D. 445 n.; *Plymouth Mutual Co-op. Society v. Traders' Publishing Association*, [1906] 1 K. B. 403; *Lyle-Samuel v. Odhams*, [1920] 1 K. B. 135.

(f) *Lyon v. Daily Telegraph*, [1943] K. B. p. 753. But it may be otherwise if the newspaper and the letter-writer are made co-defendants, *ibid.* It is no evidence of malice that the letter was anonymous, or, *semble*, written under a false name and address: *S. C.*, [1943] K. B. 746.

(g) [1906] 2 K. B. 627.

(h) *South Suburban Co-op. Society v. Orum*, [1937] 2 K. B. 690, 705. It would seem that this should equally apply to signed and unsigned articles. See 54 L. Q. R. p. 8.



judgment, and competence (i). It is said that there is a certain measure of violence or perverseness on the part of a critic which will itself condemn his criticism as unfair and actionable. Notwithstanding the dicta to this effect, it is submitted that this is not so. The distinction thus suggested is merely one of degree, which it would be impossible to reduce to definiteness. "The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?" (j).

12. *Irrelevant comment*.—Comment is not protected if it is irrelevant—i.e., if it includes defamatory references to matters which are not in law a proper subject of criticism (e.g., literary criticism which attacks the moral character of the author instead of his competence) (k). Nor is a comment protected if it is not pure comment, but is mixed with inaccurate and defamatory statements of fact. Whether a comment is relevant (i.e., whether it is directed to matters capable of being the subject of public comment) is a question of law for the Judge. So also the distinction between comment and statements of fact is a question of law for the Judge, not of fact for the jury, and therefore must not be confounded with the question of fairness, which is solely for the jury.

13. *Burden of proof*.—The burden of proving that a comment is fair is on the defendant. He must establish that the facts upon which the comment is based are true, and that the comment thereupon is warranted in the sense that it is such as might be made by a fair-minded man. Once the defendant has established that in this sense the comment is fair the onus is shifted to the plaintiff if he wishes to prove that the *prima facie* protection is displaced by the presence of malice in the defendant (l).

14. *Fairness question for the jury*.—Whether the comment is fair is a question of fact for the jury. But it is for the Judge to decide in the first place (1) whether the subject is one which is in

(i) *Wason v. Waller* (1868), L. R. 4 Q. B. p. 96.

(j) *Merivale v. Carson* (1887), 20 Q. B. D. p. 281, per Lord Esher. Cp. *Lyon v. Daily Telegraph*, [1943] K. B. p. 754, per Scott and MacKinnon, L.JJ.

(k) See Iyer, pp. 364-6.

(l) This seems the correct way in which to reconcile *Peter Walker & Son v. Hodgson*, [1900] 1 K. B. 239, with *MacQuire v. Western Morning News*, [1908] 2 K. B. 100. Cp. *Lyon v. Daily Telegraph*, [1943] K. B. p. 753, per Scott, L.J. See Gately, Libel, pp. 402-5. Salmond, 6th ed., s. 145 (12), thought the onus was on the plaintiff to prove that the comment was unfair.

law open to comment, and (2) whether there is any reasonable evidence to go to the jury that the comment is unfair (*m*). There are, therefore, two distinct checks on the action of a jury in the case of fair comment. In the first place, they are not at liberty to find for the plaintiff on the ground that in their opinion the matter was not a fit one for public comment; that is a question of law for the Judge. In the second place, they are not at liberty to find for the plaintiff on the ground that the comment is unfair, unless the Judge is first satisfied that there is sufficient evidence, extrinsic or intrinsic, of unfairness on which such a verdict could be found.

15. *Nature of defence of fair comment.*—Sir John Salmond held the view that “the defence of fair comment is simply a particular instance of qualified privilege” (*n*), and that the true nature and meaning of the defence has been obscured by certain “unfortunate dicta” in *Merivale v. Carson* (*o*). But there are difficulties inherent in his view. The unfortunate dicta to which he referred are those in which Lord Esher, M.R., and Bowen, L.J., expressed their preference for the view of the nature of this defence taken by Crompton, J., in *Campbell v. Spottiswoode* (*p*), to that taken by Willes, J., in *Henwood v. Harrison* (*q*). The view of Crompton, J., may be expressed as follows: The defence of fair comment is a denial of the libel, a traverse of the allegation in the statement of claim (*r*); the defence of privilege is an admission of the libel, but a claim that it was published in such circumstances as to afford the defendant an immunity from the ordinary consequences of publishing a libel, a plea in confession and avoidance. “A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person is entitled to do and is forbidden to do exactly the same things, and therefore the occasion is not privileged” (*s*). Therefore, the question to be put to the

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(*m*) *McQuire v. Western Morning News*, [1903] 2 K. B. 100; *Sutherland v. Stopes*, [1925] A. C. pp. 58, 63.

(*n*) 6th ed., s. 145 (9).

(*o*) (1887), 20 Q. B. D. 275.

(*p*) (1863), 3 B. & S. p. 778.

(*q*) (1872), L. R. 7 C. P. 606.

(*r*) Cp. “Fair criticism is no defamation”: *Peter Walker & Son v. Hodgson*, [1909] 1 K. B. p. 250, per Vaughan Williams, L.J.

(*s*) *Merivale v. Carson* (1887), 20 Q. B. D. p. 280, per Lord Esher.

jury is, not whether the article is privileged, but whether it is or is not a libel.

It is true that in the particular case of *Merivale v. Carson, Bowen, L.J.*, thought the question "rather academical than practical", but that must be taken merely to refer to the case then before the Court. For, if fair comment is no libel, the absence of malice should afford no defence if the comment is unfair, the presence of malice should raise no liability if the comment is itself fair (t). There was much to be said in favour of that opinion. If there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it seems difficult to say that one exceeds the limit of fair comment, because the writer of it is actuated by malice against the author, whereas the other does not exceed those limits because the writer is not so actuated. But such is now the law. The Court of Appeal so held in *Thomas v. Bradbury, Agnew & Co., Ltd.* (u), and it has since been accepted in the House of Lords that express malice will destroy a plea of fair comment (w). It does not, however, follow that fair comment is merely one branch of qualified privilege. Round what is the privilege thrown, comment or only fair comment? If all comment be privileged, then honest belief would be a good defence to an action in respect of a comment *prima facie* unfair. No one has yet suggested that this is the law. It would be manifestly absurd. But if the privilege is thrown only round fair comments, and the presence of malice prevents a comment from being fair, there is no need to talk of privilege at all; or, if we needs must, the privilege is absolute, not qualified. In any event there are two admitted differences between the defence of fair comment and the defence of qualified privilege. If the publication was upon a privileged occasion, the burden is upon the plaintiff to prove express malice; the defendant, on the other hand, has first the burden of showing that a comment is fair before the burden of proving malice is cast back upon the plaintiff (x). On the other hand, the plaintiff who has submitted his work or his acts to public criticism bears the onus of proving that a *prima facie* protected occasion is not in fact protected, whereas the defendant who relies upon a qualified privilege has affirmatively to prove

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(t) But see Lord Esher at pp. 281-2.

(u) [1906] 2 K. B. 627

(w) *Leng v. Langlands* (1916), 114 L. T. 665; *Sutherland v. Stopes*, [1925]

A. C. pp 63-64, per Lord Finlay.

(x) See s. 114 (13) and note (l), *supra*.

the existence of the privilege (y). Again, some instances of abuse of privilege (e.g., excessive publication) can have no application to the defence of fair comment (z). The analogy between the defences of qualified privilege and fair comment is indeed "far from close" (a). It seems, contrary to the opinion of Sir John Salmond (b), that the defence of fair comment is *sui generis*, and not merely a particular instance of qualified privilege (c). The difference was well illustrated in the case of *Standen v. South Essex Recordors* (d), where it was unsuccessfully claimed that comments in a newspaper on the proceedings at a meeting of a local authority were published on an occasion of qualified privilege, but none-the-less the defendants succeeded on the ground that the comments were fair and were on a matter of public interest, and the facts on which the comments were based were true. Lord Shaw said in 1925 that the law upon fair comment will demand early review (e). It is to be hoped that when that review takes place, the question as to the nature of fair comment as a defence will receive an authoritative answer (f).

### § 115. Apology

1. Under Lord Campbell's Libel Act, 1843, in actions for a libel contained in a public newspaper or periodical the defendant may plead that it was inserted without actual malice and without gross negligence and that before the commencement of the action or at the earliest opportunity afterwards he inserted in the newspaper or periodical a full apology, or, if the periodical is ordinarily published at intervals exceeding one week, had offered to publish such apology in any newspaper or periodical selected by the plaintiff. Every such defence must be accompanied by a payment

(y) *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. p. 640, *per* Collins, M.R.

(z) *Winfield* in 45 L. Q. R. 537.

(a) *Halsbury*, xx, 494.

(b) So also F. R. Y. Radcliffe, 23 L. Q. R. 97, and Collins, M.R., in *Thomas v. Bradbury, Agnew*, [1906] 2 K. B. p. 641. The judgment of Collins, M.R., does not really face the difficulty. He seems to assume that the presence of malice has "distorted" (p. 638) or "warped" (p. 642) the defendant's judgment, although he admits that it is "possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits". It is this latter case which really raises the problem.

(c) This seems to be the view of Vaughan Williams, L.J., in *Peter Walker v. Hodgson*, [1909] 1 K. B. p. 250, Fraser, Clerk and Lindsell, Gatley, Winfield, Burdick, and Iyer.

(d) (1934), 50 T. L. R. 365.

(e) *Sutherland v. Stokes*, [1925] A. C. p. 82.

(f) For discussions of this question see in particular *Halsbury*, xx, 486-7, 494; 23 L. Q. R. 5, 97; *Pollock, Torts*, pp. 202-4.

of money into Court by way of amends (g). But in practice little use is made of this defence, for if any branch of the defence fails the plaintiff must succeed in the action and damages are assessed without regard to the payment into Court, and the defendant is liable for the whole costs of the action (h).

2. *Apology in mitigation.*—It is further provided by the Act of 1843 that in any action for defamation the defendant may, provided he gives notice at the time of delivering his defence, give in evidence in mitigation of damages that he made or offered an apology before the commencement of the action or at the earliest opportunity afterwards if he had no opportunity before.

### § 116. Mitigation of Damages

1. *Evidence of plaintiff's bad reputation.*—An apology is not the only evidence which may be given in mitigation of damages. In an action for defamation the defendant, even though he does not plead justification, is entitled to adduce in mitigation of damages evidence of the plaintiff's general bad reputation prior to the publication of the libel. For since the plaintiff sues for an injury to his reputation, it is permissible for the defendant to prove in this way that such reputation was of little value. But the evidence so admissible in mitigation of damages is limited to general evidence as to the plaintiff's reputation; it does not include specific evidence of disreputable conduct or of rumours of such conduct, otherwise the position of the plaintiff in a libel action would be intolerable. In the absence of any plea of justification, notice must be given to the plaintiff before trial of the defendant's intention to adduce such evidence in mitigation of damages and the particulars thereof (i). If the plaintiff in a libel action gives evidence, he is, of course, subject to cross-examination as to credit like any other witness; but if he is cross-examined as to specific incidents, not mentioned in the particulars, and denies them, no further evidence can be called to rebut his denials, and the cross-examination is not admissible to mitigate damages (k). Where the plaintiff's own evidence or answers elicited in cross-examination show him to have been guilty of malpractices which are completely

(g) Libel Act, 1845, s. 2.

(h) See Cl. & L., pp. 599—600; Fraser, Libel, p. 255.

(i) Order XXXVI, r. 37.

(k) As to the whole matter, see *Scott v. Sampson*, 8 Q. B. D. 491; *Mangena v. Wright*, [1909] 2 K. B. 958; *Hobbs v. Tinning*, [1929] 2 K. B. 1.

unconnected with the defamatory statement of which complaint is made, for example, where a man who is defamed in respect of his professional financial integrity is shown to have been guilty of sexual delinquencies, the damages will not be reduced on the ground that his reputation is not all that it might have been (*l*). But if the evidence shows misconduct closely connected with the subject-matter of the libel, for example, where it shows that a servant, who was wrongly stated to have adulterated milk, was in other respects a dishonest servant, this will be taken into consideration in assessing the damages to which he is entitled (*m*).

2. *Provocation*.—Provocation *in pari materia* may be given in evidence in mitigation. “If two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side” (*n*). But nominal damages will be given.

3. *Consolidation of actions*.—Where there are several publications of the same libel (as, for example, in different newspapers), a separate action will lie for each publication; but in such cases it is provided by the Law of Libel Amendment Act, 1888, that on the application of the defendants the actions may be consolidated and tried together, the total amount of damages being assessed as one sum, and apportioned among the several defendants as the jury thinks fit. By the same Act it is provided that in any action for a libel contained in a newspaper the defendant may prove in mitigation of damages that the plaintiff has already recovered or received or sued for compensation in respect of any other publication of the same or a similar libel (*o*).

### § 117. Slander and Special Damage

1. *Slander not actionable without proof of damage*.—Libel is in all cases actionable *per se*; but slander is not actionable without proof of special damage, save in certain exceptional cases.

2. The special damage required in actions for slander must be the loss of some definite material advantage; it must not consist

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(*l*) *Hobbs v. Tinsling*, [1929] 2 K. B. 1.

(*m*) *Hawkins v. Express Dairy Co.* (1940), 163 L. T. 147.

(*n*) *Per Mansfield, C.J.*, in *Finnerty v. Tipper* (1809), 2 Camp. p. 77.

(*o*) In some cases it has been treated as a mitigation of damages that the statement is on its face a mere repetition, and the original authority has been disclosed. See *Cl. & L.*, p. 652.

merely in the loss of reputation itself (*p*). A loss of the voluntary hospitality of friends is sufficient, however (*q*), and so also in all probability is a resulting separation between husband and wife (*r*).

8. *Remoteness of damage*.—The special damage must not be too remote. Thus, in *Speake v. Hughes* (*s*) the plaintiff, a barman, was dismissed by his employer because of a statement by the defendant that the plaintiff had removed from premises occupied by him without having paid his rent; and it was held that no action lay, for the special damage proved was too remote. We have already seen (*t*) that in these cases the damage is probably too remote even though it is caused by a *novus actus* which should have been anticipated. Again in *Allsop v. Allsop* (*u*) illness resulting from the mental trouble produced by slander was held too remote (*w*).

4. *Damages due to repetition of slander*.—In particular, special damage is too remote if it is due not to the original slander, but to a repetition of it by other persons (*x*). Therefore it is in ordinary cases insufficient for the plaintiff to prove that since the publication of the slander his business has fallen away; because such a result must have been due not to the original slander, but to the subsequent propagation of it by means of repetition (*y*). But it is otherwise if the original slander is published to so many persons that the diminution of the plaintiff's business may be reasonably attributed to it rather than to subsequent repetition (*z*).

5. There are two exceptions to the rule that damage caused by the repetition of a slander is too remote—(1) when the original statement is made to a person who is under a legal or moral duty to repeat it (*a*); (2) when repetition is authorised or intended by the defendant, for it is a general rule that no result which is intended can be too remote (*b*).

(*p*) *Roberts v. Roberts* (1864), 5 B. & S. 384.

(*q*) *Davies v. Solomon* (1871), L. R. 7 Q. B. 112; *Moore v. Meagher* (1807), 1 Taunt. 39.

(*r*) *Lynch v. Knight* (1861), 9 H. L. C. 577.

(*s*) [1904] 1 K. B. 138.

(*t*) *Supra*, s. 34 (32).

(*u*) (1860), 5 H. & N. 534.

(*w*) See also *Lynch v. Knight* (1861), 9 H. L. C. 577.

(*x*) *Ward v. Weeks* (1830), 7 Bing. 211; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

(*y*) *Dixon v. Smith* (1860), 5 H. & N. 450.

(*z*) See *Ratliffe v. Evans*, [1892] 2 Q. B. 524.

(*a*) *Derry v. Handley* (1867), 16 L. T. (N.S.) 263.

(*b*) *Weld-Blundell v. Stephens*, [1920] A. C. 956, 999; *supra*, s. 34 (25).

6. *Measure of damages.*—It seems to be the better opinion that when special damage is proved, damages can be recovered not merely for it, but for the injury to the plaintiff's reputation generally—that is to say, compensation is not limited to the amount of actual loss proved, but proof of some actual loss is an essential foundation for a claim of general damages for slander (c).

### § 118. Slander Actionable *per se*

1. *Cases of slander actionable per se.*—In the following cases slander is actionable *per se* without proof of special damage :—

- (a) An imputation that the plaintiff has committed a criminal offence;
- (b) An imputation that the plaintiff suffers from an existing contagious venereal disease (d);
- (c) An imputation of unchastity against a woman;
- (d) An imputation against the plaintiff in the way of his business or office.

In the last of these cases damage is presumed because the slander is so obviously damaging to the financial position of the victim that pecuniary loss is almost certain, in the first two cases because it is so intrinsically outrageous that it ought to be actionable even if no pecuniary loss results. In the third case for both reasons, for an imputation of unchastity not only brings a woman into social disfavour but is calculated to damage her prospects in the marriage market and thereby her finances (e).

2. *Accusation of crime.*—An imputation of a criminal offence to be actionable *per se* must amount to a direct charge, and must not be a mere suggestion or statement of suspicion (f). The crime charged need not be indictable; but it must not be an offence punishable by fine merely (g). Since the resultant social ostracism is the true basis of the rule it follows that a charge of having been convicted of a crime comes under it, even though the plaintiff is not thereby put in jeopardy of a criminal prosecution (h).

(c) *Dixon v. Smith* (1860), 5 H. & N. p. 453; *Brown v. Smith* (1853), 22 L. J. C. P. 151, *per* Jervis, C.J., and *Creswell, J. Contra: S. C.*, *per* Williams, J.; *Fraser, Libel*, p. 185.

(d) *Bloodworth v. Gray* (1864), 7 M. & G. 334.

(e) *Kerr v. Kennedy*, [1942] 1 K. B. p. 411, *per* Asquith, J.; *Gray v. Jones* (1939), 160 L. T. 361; *D. & L. Caterers v. D'Ajou* (1915), 61 T. L. R. 212.

(f) *Simmons v. Mitchell* (1880), 6 A. C. 156.

(g) *Webb v. Beavan* (1883), 11 Q. B. D. 609; *Hellwig v. Mitchell*, [1910] 1 K. B. 609; *Ormiston v. G. W. Ry.*, [1917] 1 K. B. p. 601.

(h) *Gray v. Jones* (1939), 160 L. T. 361. *Contra*, *Winfield*, 272.



3. *Accusation of unchastity.*—At common law a verbal imputation of unchastity is not actionable *per se*, but it is now provided by the Slander of Women Act, 1891, that “words spoken and published . . . which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable” (i).

4. *Imputations in respect of trade or office.*—Any defamatory imputation upon a man in the way of his profession, business, or office is actionable *per se*: for example, a charge of insolvency against a trader (k), of incompetence against a surgeon, of ignorance against a lawyer. A defamatory charge, however, against a man in respect of a business in which he is no longer engaged, or in respect of an office which he no longer holds, is not actionable *per se* (l). When the plaintiff’s office is not one of profit, but one of honour only, such as that of a Justice of the Peace, words spoken of him in that regard, and imputing unfitness or incompetency, are not actionable *per se*, unless, if true, they would be a ground of deprivation (m).

A charge is not actionable *per se* merely because it tends to injure the plaintiff in the way of his business or office; it must amount to a charge against him *in relation* to his business or office. Thus, it is not actionable *per se* to impute dishonesty to a solicitor, unless he is alleged to be dishonest towards his clients (n). Nor is it actionable *per se* to impute adultery to a physician, unless the charge involves a breach of his professional duty towards his patients (o), or to impute immoral conduct to a schoolmaster

(i) In *Yousoupoff v. Metro-Goldyn-Mayer Pictures* (1934), *The Times*, March 6, p. 5, Avory, J., said *obiter* that it was an attack upon a woman’s chastity to say that she had been raped. And in the Court of Appeal Scrutton, L.J., seems to have been of the same opinion, but Slesser, L.J., expressed no opinion: (1934), 50 T. L. R. pp. 584, 587. Yet were the women who suffered from the German soldiery in Belgium in 1914 unchaste, and does a woman who receives alimony *dum casta* lose it if she is raped? But in holding that an accusation of lesbianism was an imputation of unchastity, Asquith, J., considered the meaning of “*dum casta*” in this clause as irrelevant, and in preference turned to ordinary dictionaries: *Kerr v. Kennedy*, [1942] 1 K. B. 409. But see Goodhart in 58 L. Q. R. 441.

(k) *Brown v. Smith* (1853), 13 C. B. 596.

(l) *Hopwood v. Thorn* (1849), 8 C. B. 293.

(m) *Alexander v. Jenkins*, [1892] 1 Q. B. 797. *Aliter* if the words impute dishonesty: *Booth v. Arnold*, [1895] 1 Q. B. 571.

(n) *Doyley v. Roberts* (1837), 3 Bing. N. C. 835; *Dauncey v. Holloway*, [1901] 2 K. B. 441.

(o) *Ayre v. Craven* (1834), 2 A. & E. 2.

except in the way of his business (*p*). But the circumstances in which the words were used and to whom they were spoken may relate them to the plaintiff's occupation even if on their face they are not so related, and in the two cases last mentioned if the words had been spoken respectively to the President of the Medical Association and to the schoolmaster's employers in order to induce them to get rid of him they would have been actionable without proof of special damage (*q*).

5. *Slanders upon corporations*.—A corporation can sue for a slander if the words complained of impute to it the commission of a criminal offence which, in the case of a natural person, could be punished corporally, and, where the words reflect on a limited company in the course of its business, an action will lie even without proof of actual damage (*r*).

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(*p*) *Jones v. Jones*, [1916] 2 A. C. 481. See this case as to the existence of possible exceptions in respect of charges of insolvency against traders and of immorality against beneficed clergymen. In *Gallwey v. Marshall* (1853), 9 Ex. 294, followed by *Wakeford v. Wright* (1922), 39 T. L. R. 107, it was held that slanderous charges of immorality against a clergyman in holy orders, but not holding any office of temporal profit, are not actionable without proof of damage.

(*q*) *De Stempel v. Dunkels* (1937), 153 L. T. 85, 88.

(*r*) *D. & L. Caterers, Ltd. v. D'Ajou* (1945), 61 T. L. R. 212.

## CHAPTER XIV

## NEGLIGENCE

## § 119. Objective Negligence

1. *The objective test of negligence.*—Sir John Salmond did not accept the view that negligence was ever a purely objective fact involving no characteristic or essential mental attitude at all (a). Nor does he appear to have thought that negligence had developed into a specific tort, but regarded it merely as a state of mind providing the essential condition of liability for recognised torts (b). There is, however, abundant authority to show that our Judges recognise the existence of an “action of negligence” (c). The decision of the House of Lords in *Donoghue v. Stevenson* (d) “treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty” (e). Actions do not lie for a state of mind. “Negligence is conduct, not a state of mind”—“conduct which involves an unreasonably great risk of causing damage” (f). It is negligence in its objective sense that is referred to in the well-known definition of Alderson, B., in *Blyth v. Birmingham Waterworks Co.* (g): “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” So also Lord Wright said in *Lochgelly Iron and Coal Co. v. M'Mullan* (h): “In strict legal analysis, negligence means more than heedless or careless conduct, whether in

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(a) 7th ed., pp. 23–4.

(b) Cp. Beven, *Negligence*, 4th ed., p. 1.

(c) The authorities are collected by Winfield: 42 L. Q. R. p. 199.

(d) [1932] A. C. 562.

(e) *Grant v. Australian Knitting Mills*, [1936] A. C. p. 103, *per* Lord Wright. Cp. Miles in Dig. pp. 510–1.

(f) H. T. Terry, “Negligence”, 29 H. L. R. p. 40, *Harvard Essays*, p. 261; Pollock, *Torts*, pp. 350–3.

(g) (1856), 11 Ex. at p. 784. This statement has been criticised by Eldredge, *Modern Tort Problems*, pp. 11–4, because the omission to do something rarely constitutes negligence. Most of the cases of apparent omission are really cases of commission because the defendant has created the dangerous situation.

(h) [1934] A. C. p. 25.

omission or commission : it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing." "That anxious consideration of consequences" which, according to Salmond (i), "is called care" does not preclude negligence. The mental theory of negligence would leave society unprotected against deficiencies in foresight, will-control, moral qualities and intelligence. Nor is a higher degree of conduct required of the man who is more than usually blessed with these qualities (k). "The theory that negligence is or involves a state of mind is an outgrowth of the artificial use of words like 'care', 'reasonable' and 'prudent'; of the proposition that negligence involves fault; and of a supposed analogy between negligence and intentional harms; all aspects, more or less, of the nineteenth century attempt to Romanise the common law by making all liability rest, not simply and directly upon the social advantage of discouraging certain conduct and compensating certain harms, but upon a guilty mind or will" (l). It seems that an objective test is applied to the moral qualities, the will and intelligence, but that the physical characteristics, the knowledge and the skill of the actor himself determine his liability (m).

2. *Statutory negligence*.—So clearly is the action of negligence now recognised as an independent tort that the House of Lords in *Lochgelly Iron and Coal Co. v. M'Mullan* (n) has settled that an action for breach of a statutory duty which involves the notion of taking care not to injure (o) is an action of negligence. "Whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute" (p). The breach of such a duty is "statutorily equivalent to negligence" (q) and Lord Wright said (r) that it had

(i) 7th ed., p. 23.

(k) H. W. Edgerton, 39 H. L. R. p. 866. Cp. Holmes, Common Law, pp. 108—111.

(l) Edgerton, *op. cit.* p. 869.

(m) Seavey in 41 H. L. R. 1. The American Restatement goes into greater refinements, ss. 289-90. See s. 121, *infra*. See also Green, Judge and Jury, ch. 5.

(n) [1934] A. C. 1, see Lords Atkin, Macmillan and Wright at pp. 10, 17-8, and 23-7.

(o) See *East Suffolk Catchment Board v. Kent*, [1941] A. C. p. 88, *per* Lord Atkin. Cp. *Lewis v. Denye*, [1940] A. C. pp. 924-5, *per* Lord Simon.

(p) [1934] A. C. p. 23, *per* Lord Wright.

(q) *David v. Britannic Merthyr Co.*, [1909] 2 K. B. p. 164, *per* Fletcher Moulton, L.J.

(r) *Lochgelly Case*, *ubi supra*, p. 23, and he cited at p. 25, Bullen and Leake, 375.

been "correctly described as statutory negligence" (s). But he appears subsequently to have modified his views, for in *Caswell v. Powell Duffryn Collieries, Ltd.* (t) he said he did not think that an action for breach of a statutory duty to fence machinery was "completely or accurately described as an action in negligence. It belongs to the category often described as that of cases of strict or absolute liability". In that case Lord Macmillan adhered to the view which he had previously expressed in the *Lochgelly Case* that the action is a common form action of damages for negligence and that it is quite immaterial whether the duty to take care arises at common law or is imposed by statute (u). But whatever may be the truth of the matter, we shall for convenience treat of the breach of statutory duties in a separate chapter (w).

### § 120. The Duty of Care

1. *The duty of care.*—There is no liability for negligence unless there is in the particular case a legal duty (x) to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others. "The ideas of negligence and duty are strictly correlative", said Bowen, L.J. (y), "and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody." This duty of carefulness is not universal; it does not extend to all occasions, and all persons, and all modes of activity. "The mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists" (z). There are cases in which,

(s) A phrase apologetically coined by Fletcher Moulton, L.J., *loc. cit.* and adopted by Lord Wright, *ubi supra*. See Landon in Pollock, 347.

(t) [1940] A. C. pp. 177-8.

(u) *S. C.* p. 167. Lord Porter merely mentioned the problem, but see his speech in *Riddell v. Reid*, [1948] A. C. pp. 31-2. There is, of course, no need to prove negligence: *Lochgelly Case*, *ubi supra*, p. 27. The point seems to be purely academic. *Vide infra*, s. 145. But see *Marshall v. L. P. T. B.*, [1936] 3 A. E. R. p. 88.

(w) *Infra*, ch. xvi.

(x) As to the meaning of "duty", see Winfield, 34 Col. L. R. p. 43.

(y) *Thomas v. Quartermaine* (1887), 18 Q. B. D. p. 694. Cp. *Donoghue v. Stevenson*, [1932] A. C. p. 618, *per* Lord Macmillan.

(z) *Grant v. Australian Knitting Mills*, [1936] A. C. p. 108, *per* Lord Wright. "It is fatally easy by transposing the word 'careless' into 'negligent', to dismiss from one's mind the essential problem—namely, whether or not there

although there is a duty not to cause harm intentionally, there is no corresponding duty to take care not to cause it accidentally. Thus, I must not deceive another to his own hurt by wilfully telling him lies, but I am commonly under no obligation to take care that the statements which I make to him are true. So a man may be under a duty of care towards one person, and yet in the same matter and on the same occasion under no duty of care towards another (a). The occupier of premises is bound towards persons lawfully entering on them to take care that they are free from concealed danger, but he owes no such duty to a trespasser. A plaintiff cannot build a cause of action on a wrong to some one else (b). "English law does not recognise a duty in the air, so to speak: that is, a duty to undertake that no one shall suffer from one's carelessness" (c) (d). "In the case of a civil action, there is no such thing as negligence in the abstract." The duty is not owed to the world at large (e). But it is not necessary that there should be a specific person to whom the duty is owed at the time of the negligence; the duty may be potential or contingent (f).

2. *Duty of care peculiar to English Law.*—Roman Law dispensed with any special duty between the parties. In Roman Law there was liability wherever there was damage unjustifiably done. The Roman doctrine, restricted as it was by rules similar to those of contributory negligence and remoteness, provided a simpler and better solution of the problems involved than English law with its reliance upon a duty to take care (g). In the days of strict pleading if an action was brought in case for negligence it was founded upon the defendant's duty, just as the obligation of a

was in any particular case a failure of duty": *Sharp v. Avery*, [1938] 4 A. E. R. p. 88, *per* Slessor, L.J. Cp. Lord Porter in *Bourhill v. Young*, [1943] A. C. p. 117.

(a) It is, for example, not yet settled whether, if a doctor is called in by A to examine B, he owes any duty of care to B in certifying him as of unsound mind, though he clearly owes such a duty to A. See the cases fully discussed in *de Freville v. Dill* (1927), 138 L. T. 83, *per* McCardie, J.

(b) *Bourhill v. Young*, [1943] A. C. p. 108, *per* Lord Wright. Cp. pp. 113, 116-7, *per* Lord Porter.

(c) *Bottomley v. Bannister*, [1932] 1 K. B. p. 476, *per* Greer, L.J.

(d) But English law seems to recognise negligence without a corresponding duty in cases of contributory negligence: *infra*, s. 124 (9). This has been described by Blackburn, J., in *Swan v. N. British Australasian Co.* (1863), 2 H. & C. 182, as "neglect of what would be prudent in respect to the party himself".

(e) *Bourhill v. Young*, *ubi supra*, pp. 116-7, *per* Lord Porter.

(f) *Grant v. Australian Knitting Mills*, [1936] A. C. p. 104.

(g) Buckland in 51 L. Q. R. 637

promise was necessary to found an action in *assumpsit* (h). Dr. Winfield thinks (i) that every case could be just as well decided on some ground not depending on duty at all—sufficiency of evidence for the jury, contributory negligence, remoteness of damage, inevitable accident, *volenti non fit injuria*. But the doctrine is now firmly established in English law and we must consider when such a duty of care exists.

3. *When a duty of care exists.*—It is a question of law whether in any particular circumstances a duty of care exists (k). The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient for the Courts to say whether the duty exists in those particular circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, and distinctions based on the particular relations of the one side or the other. "In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the Judge (l). . . . There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances" (m). But the Courts have shrunk from giving a

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(h) Contrast Chitty, Pleading (5th ed.), p. 373 with p. 669, and p. 334 with p. 672. Winfield in 34 Col. L. R. pp. 44—54 seems to post-date the duty conception. See Chitty, *op. cit.*, p. 712.

(i) "Duty in Tortious Negligence" in 34 Col. L. R. 41, p. 64. But Roman-Dutch law has accepted the requirement of a duty to take care: McKerron, s. 9.

(k) It is not always easy to distinguish the determination of the existence of the duty from the determination of the violation of the duty (which is for the jury). See Green, Judge and Jury, p. 67. So in *Camkin v. Bishop* (1941), 165 L. T. 246, a schoolboy of fourteen was injured by a lump of earth thrown by another boy whilst they were "ragging" when helping a local farmer. The headmaster was sued. It was held that the defendant was under no duty to see that the boys whilst engaged upon such work were under supervision. It might equally well have been held that the defendant was under a duty to take reasonable precautions for the safety of his pupils, but that there was no evidence to submit to a jury of a failure to perform that duty. Cp. *Ricketts v. Erith B. C.* (1943), 169 L. T. 396 (where in the case of a child injured in a playground, Tucker, J., held that the duty of the school authority was that of a "reasonably careful parent").

(l) Cp. "the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote": *Grant v. Australian Knitting Mills*, [1936] A. C. p. 107.

(m) *Donoghue v. Stevenson*, [1932] A. C. pp. 579—580, *per* Lord Atkin.

complete logical definition of the general principle. The nearest approach to any such general definition is that of Lord Atkin in *Donoghue v. Stevenson* (n). "The liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Atkin's general proposition was almost immediately declared by Scrutton, L.J. (o), to be wider than necessary and to need qualification. A shopkeeper finds a shop has been erected next door to him, the second shopkeeper selling the same class of goods at half the price charged by the first. The second man intends to injure the first, but the first has no cause of action, although the two are near to each other. Lord Atkin himself in a later case (p) seems to have recognised that his proposition of law was too wide and said that "every person . . . is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care". This limitation, which we have put in italics, was implicit, though not expressed in *Donoghue's Case* itself (q). Lord Macmillan was more cautious in *Donoghue's Case* than Lord Atkin. He gave no general proposi-

(n) [1932] A. C. p. 580.

(o) *Farr v. Butters*, [1932] 2 K. B. pp. 613—4. Singleton, J., said that no doubt it was "a considerable alteration of the law": *Barnett v. Packer*, [1940] 3 A. E. R. p. 577.

(p) *East Suffolk Rivers Catchment Board v. Kent*, [1941] A. C. p. 89. This appears to have settled some of the doubts expressed by Landon in Pollock, pp. 344—7. See 57 L. Q. R. 179.

(q) Cp. Scott, L.J., in *Haseldine v. Daw*, [1941] 2 K. B. p. 360.



tion to determine what are the circumstances which give rise to the duty to take care, but emphasised "the breadth and elasticity of the conception of actionable negligence in our law" (r). "In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed" (s). In *Donoghue's Case* the House of Lords "enlarged the conception of duty" (t), and it is for that reason that it is now regarded as a leading case. If we want to find the general principle behind that enlargement of duty we are driven back to Lord Atkin's speech which has since been accepted by the Courts as affording a valuable practical guide (u) and as pointing the way to further extensions (w). Lord Atkin himself expressed his principle in terms of "proximity" in the sense in which he used "neighbour" (x). Lord Wright prefers

(r) *Cunard v. Antifyre*, [1933] 1 K. B. p. 560, *per* Talbot, J.

(s) [1932] A. C. p. 619. Cp. *Bourhill v. Young*, [1943] A. C. p. 107.

(t) *Haseldine v. Daw*, [1941] 2 K. B. p. 379, *per* Goddard, L.J.

(u) Lord Atkin himself never intended it to be more. I do not think I was guilty of "unfair criticism" of Lord Atkin in previous editions as alleged by Scott, L.J., in *Haseldine v. Daw*, [1941] 2 K. B. p. 362. See my vindication by Friedmann in 5 Mod. L. R. 245.

(w) As in *Cunard v. Antifyre*, [1933] 1 K. B. 551; *Taylor v. Liverpool Corporation*, [1939] 3 A. E. R. p. 337; *Wilchick v. Marks*, [1934] 2 K. B. 56, at p. 67; *Haynes v. Harwood*, [1934] 2 K. B. 240, at p. 247; *Brown v. Cotterill*, (1934) 51 T. L. R. 21 (negligently erected tombstone falling on small girl attending to flowers on grandmother's grave); *Malfrout v. Nozal* (1935), 51 T. L. R. 551 (badly attached side-car); *Read v. Croydon Corporation*, [1938] 4 A. E. R. 631, 665 (supply of water infected by typhoid bacillus), and see cases cited *infra*, s. 149 (5). See Underhay in 14 Can. Bar. Rev. pp. 307-310; Glanville Williams in 92 L. J. (N.) 115, 124, 132. Contrast *Otto v. Bolton*, [1936] 2 K. B. 46.

(x) [1932] A. C. p. 581. Lord Atkin founded the statement of his principle upon the much-criticised dicta of Lord Esher (then Brett, M.R.) in *Heaven v. Pender* (1883), 11 Q. B. D. pp. 509-11 (of which Lord Buckmaster, in his dissenting speech in *Donoghue v. Stevenson*, said, at p. 576, that it was better that they "should be buried so securely that their perturbed spirits shall no longer vex the law", but which were put into their true perspective by Lords Atkin and Macmillan, [1932] A. C. pp. 581, 614, see *Haseldine v. Daw*, [1941] 2 K. B. p. 360, *per* Scott, L.J.) as "limited by the notion of proximity introduced by Lord Esher and A. L. Smith, L.J., in *Le Lievre v. Gould*", [1933] 1 Q. B. pp. 497, 504. Goddard, L.J., has since accepted the proximity test in *Hanson v. Wearmouth Coal Co.*, [1939] 3 A. E. R. p. 54, and *Paine v. Colne Valley Electricity Co.* (1938), 160 L. T. p. 126, but Lord Wright in *Grant v. Australian Knitting Mills*, [1936] A. C. p. 104, and Pollock, 459, regard it as misleading.

"reasonable foreseeability of the danger" as the criterion (y), whilst Lord Thankerton doubts whether "it is possible or profitable to lay down any hard and fast principle, beyond the test of remoteness as applied to the particular case" (z).

4. *No special duty owed to abnormal persons.*—In substance all these tests are the same in effect and it follows that in determining whether a duty exists the law will not take account of abnormal susceptibilities or infirmities in the plaintiff of which the defendant neither knew nor could reasonably have been taken to have foreseen. The duty does not extend beyond people of ordinary health or susceptibility. "A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity", though once the wrong is established the wrongdoer must take the victim as he finds him (a). This was clearly laid down in the House of Lords in *Bourhill v. Young* (b). There A, a motor-cyclist, whilst driving at an excessive speed, collided with a motor-car and was killed. A fish-wife, whilst getting her fish-basket off the far side of a stationary tramcar, heard though she did not see the accident. Though she had no reasonable fear of immediate bodily injury to herself she suffered from fright and was unable to carry on her business for some time. She was eight months pregnant and a month later the child was stillborn. It was held that she was not within the area of potential danger and that the cyclist therefore owed no duty to her.

In the light of *Bourhill's Case* it would seem that in some of the older cases (c) facts which have in reality raised a problem as to the existence of a duty have been treated on the basis that the question involved was the remoteness of the damage.

5. We shall deal in separate chapters with some of those duties

(y) *Glasgow Corporation v. Muir*, [1943] A. C. p. 460, and in *Bourhill v. Young*, [1943] A. C. p. 107. Cp. Lord Russell, *S. C.*, pp. 101-2, and in Roman-Dutch law, McKerron, pp. 38-40.

(z) *Bourhill v. Young*, [1943] A. C. p. 98. Cp. Goddard, L.J., in *Haseldine v. Daw*, [1941] 2 K. B. p. 377, cited *infra*, p. 575; Clauson, L.J., *S. C.* p. 366; *Grant's Case*, *supra*, p. 107.

(a) *Bourhill v. Young*, [1943] A. C. pp. 109-10, *per* Lord Wright, *supra*, s. 34 (17).

(b) [1943] A. C. 92. The conclusion in this case has been criticised by Charlesworth in 59 L. Q. R. 150. See, however, Goodhart in 8 Camb. L. J. 265 *sqq.*

(c) *E.g.*, *Smith v. L. & S. W. Ry.* (1870), L. R. 6 C. P. 14; see the judgment of Blackburn, J., at p. 21.

which have been examined and classified by the Courts in particular cases, for example, the duties imposed upon the owners, occupiers or possessors of premises, of dangerous animals and chattels, upon persons putting the criminal law in motion, and so forth.

### § 121. The Standard of Care

1. *Care a matter of degree.*—Care is a matter of degree. It is not sufficient, therefore, for the law to lay down merely that it is the duty of persons to use care. It is necessary to go further and to determine, not merely the existence of such a duty, but also the degree or amount of care which is obligatory: that is to say, to define the legal standard of due care. What then is this standard?

2. *Greatest possible care not required.*—It is clear, in the first place, that the law does not require the highest degree of care of which human nature is capable. It does not require a man to refrain from an act merely because a certain amount of danger is caused by it. It does not insist that men shall so anxiously consider the interests of their fellows as never to expose them to any risk of harm however small. To drive a car down a crowded street is not in itself a negligent act, although accidents constantly happen from such a cause. The risk of harm is so small in such cases that the law allows the danger to be knowingly created. To lay down any other rule would unreasonably restrict the beneficial activities of mankind for the sake of avoiding a remote and unlikely evil.

3. *Care according to best of defendant's judgment and belief not sufficient.*—On the other hand, it is not sufficient that the defendant has acted in good faith to the best of his judgment and belief, and has used as much care as he himself believed to be required of him in the circumstances by reason and justice. The question in every case is not whether the defendant, however honestly, thought his conduct sufficiently careful, but whether in fact it attained to the standard of due care established by law (*d*).

4. *Reasonable care required and sufficient.*—The degree or standard of care which the law requires is that which is reasonable in the circumstances of the particular case (*e*). This obligation to use reasonable care is very commonly expressed by reference to the

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(*d*) *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468.

(*e*) *Ford v. L. & S. W. Ry.* (1862), 2 F. & F. 730.

conduct of a reasonable man, or of an "ordinarily prudent man", meaning thereby a reasonably prudent man (f). "The standard of foresight of the reasonable man", said Lord Macmillan (g), "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence." And Greer, L.J., said: "The person concerned is sometimes described as 'the man in the street', or 'the man in the Clapham omnibus', or, as I recently read in an American author, 'the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves'" (h).

But such imagery may be misleading. The "man in the street" does not always show the care expected of a reasonably prudent man in the circumstances. The general rule is that "a defendant charged with negligence can clear his feet if he shows that he has acted in accord with the general and approved practice" (i). But the general practice itself may not conform to the standard of care required of a reasonably prudent man. In such a case it is not a good defence that the defendant acted in accordance with the general practice (k). "Neglect of duty does not cease by repetition to be neglect of duty" (l). Nor is a man necessarily relieved of the duty to anticipate an accident merely because no similar accident has happened before, if the nature of the case is such as to render reasonably apparent the possibility

(f) *Cp. Vaughan v. Menlove* (1837), 3 Bing. N. C. 468, p. 475, *per* Tindal, C.J.; *Blyth v. Birmingham Waterworks Co.* (1856), 11 Ex. p. 784, *per* Alderson, B.; Pollock, p. 351. See on this subject C. K. Allen in 36 Jur. Rev. 254; Pollock, Expansion, pp. 123-126.

(g) *Glasgow Corporation v. Muir*, [1943] A. C. p. 457.

(h) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 224.

(i) *Vancouver General Hospital v. McDaniel* (1934), 152 L. T. p. 57, *per* Lord Atless. *Cp. Marshall v. Lindsey C. C.*, [1935] 1 K. B. p. 540, *per* Maughan, L.J., dissenting; *Mahon v. Osborne*, [1939] 2 K. B. p. 43, *per* MacKinnon, L.J.

(k) *Savory & Co. v. Lloyds Bank*, [1932] 2 K. B. 122; *Markland v. Manchester Corporation*, [1934] 1 K. B. 566 (affirmed in the House of Lords (1935), 51 T. L. R. 527), and *Marshall v. Lindsey C. C.*, [1935] 1 K. B. 516, and the discussion of the two latter cases in 52 L. Q. R. p. 8 (but it should be noted that the writer of the note takes his facts from the dissenting judgments). *Cp. Croston v. Vaughan*, [1938] 1 K. B. 540. But see 2 Mod. L. R. p. 68.

(l) *Bank of Montreal v. Dominion Guarantee Co.*, [1930] A. C. p. 666, *per* Lord Tomlin; *Carpenters Co. v. British Mutual Banking Co.*, [1937] 3 A. E. R. p. 820.

of danger emerging as the result of his acts (*m*). On the other hand, the fact that experience subsequent to the alleged negligence proves that some additional precaution was necessary does not in itself prove negligence at the earlier date. "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident" (*n*). "It is easy to be wise after the event" (*nn*).

5. *Test of reasonableness. A question of fact.*—What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the defendant whose conduct is the subject of inquiry (*o*). Whether in those circumstances, as so known to him, he used due care—whether he acted as a reasonably prudent man—is a mere question of fact as to which no legal rules can be laid down (*p*). It would seem clear, however, that for the proper determination of this question of fact there are two chief matters for consideration. The first is the magnitude of the risk to which the defendant exposes other persons by his action (*q*). "The degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life" (*r*). "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken

(*m*) *Fryer v. Salford Corporation*, [1937] 1 A. E. R. p. 620, *per* Slessor, L.J. But novelty is often an important element in determining the foresight of a reasonable man. Compare *Slingsby v. District Bank*, [1932] 1 K. B. pp. 559–60, with *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777.

(*n*) *Hart v. L. & Y. Ry.* (1869), 21 L. T. p. 263, *per* Bramwell, B. *Cp. Glasgow Corporation v. Muir*, [1943] A. C. p. 455, *per* Lord Thankerton; *Marshall v. Lindsey C. C.*, [1935] 1 K. B. p. 549, *per* Maugham, L.J.; *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 225, *per* Greer, L.J.; *Savory & Co. v. Lloyds Bank*, [1932] 2 K. B. p. 134, *per* Scrutton, L.J.

(*nn*) *Baker v. Bethnal Green B. C.*, [1944] 2 A. E. R. p. 307, *per* Singleton, J.

(*o*) *Cp. Bankes, L.J.*, in *Harnett v. Bond*, [1924] 2 K. B. p. 584.

(*p*) *Commissioners of Taxation v. English, Scottish and Australian Bank*, [1920] A. C. p. 689. The standard of the reasonable man involves in its application a subjective element, for Judges may differ as to what in a particular case the reasonable man would have foreseen: *Glasgow Corporation v. Muir*, [1943] A. C. p. 457, *per* Lord Macmillan.

(*q*) *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 126. There are two factors in determining the magnitude of a risk—the seriousness of the injury risked, and the likelihood of the injury being in fact caused. "The possibility of a great danger has the same effect as the probability of a less one": *Holmes, Common Law*, p. 154. For a fuller analysis, see *H. T. Terry*, 29 H. L. R. 40, *Harvard Essays*, 261; *H. W. Edgerton*, 39 H. L. R. pp. 862–865.

(*r*) *Glasgow Corporation v. Muir*, [1943] A. C. p. 456, *per* Lord Macmillan.

extraordinary precautions. . . . People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (s). The second is the importance of the object to be attained by the dangerous form of activity. The reasonableness of the defendant's conduct will depend upon the proportion which the risk bears to the object to be attained. To expose others to a risk of harm for a disproportionate object is unreasonable, whereas an equal risk for a better cause may be lawfully run without negligence. By running trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by running at ten miles an hour. But this additional safety would be attained at too great a cost of public convenience, and therefore, in neglecting this precaution, the companies do not fall below the standard of reasonable care and are not guilty of negligence (t).

6. *Different degrees of negligence not recognised.*—The law of torts (u) does not recognise different standards of care or different degrees of negligence in different classes of cases. The sole standard is the care that would be shown in the circumstances by a reasonably careful man, and the sole form of negligence is a failure to use this amount of care. It is true, indeed, that this amount will be different in different cases, for a reasonable man will not show the same anxious care when handling an umbrella as when handling a sword (w). Again, a man may hold himself out as having a special skill which he does not in fact possess and then the maxim *imperitia culpæ adnumeratur* applies. The negligence does not consist in the lack of skill but in undertaking the work without skill (x). Thus a surgeon, though he is not an insurer against every accidental slip, must exercise such care as a normally skilful member of the profession may reasonably be expected to exercise (y), but a jeweller who pierces ears for earrings is only under a duty to take the precautions which may reasonably be expected

(s) *Fardon v. Harcourt-Rivington* (1932), 146 L. T. p. 392, *per* Lord Dunedin.

(t) *Ford v. L. & S. W. Ry.* (1862), 2 F. & F. 730. *Cp. Knight v. G. W. Ry.*, [1943] K. B. 105. It has been said that the final test is: "Is the game worth the candle?" See Eldredge, *Modern Tort Problems*, p. 10. *Vide supra*, s. 121 (2).

(u) *Aliter* in other branches of law, e.g., trusts (Hanbury, *Equity*, p. 275 n.), and criminal law: *R. v. Bateman* (1925), 19 Cr. App. R. p. 13.

(w) *Vide supra*, s. 121 (5). See Lord Wright in *Caswell v. Powell Duffryn Collieries*, [1940] A. C. pp. 175-6; du Parcq, L.J., in *Duncan v. Cammell Laird* (1942), 171 L. T. p. 202. In some cases "a man should act on certainties, not probabilities", e.g., he should make certain that a gun is not loaded.

(x) *Vide supra*, s. 7 (3).

(y) *Mahon v. Osborne*, [1939] 2 K. B. p. 81, *per* Scott, L.J. (dissenting).

of a jeweller (z). So a very high standard of skill and care is demanded of the driver of a motor-car—since the motor-car has become a lethal weapon. Like the surgeon he undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons (a). But this is a different thing from recognising different legal standards of care; the test of negligence is the same in all cases (b). The magnitude of the negligence is irrelevant to the existence of the duty (c).

### § 122. The Proof of Negligence

1. *Burden of proving negligence.*—The burden of proving negligence is on the plaintiff who alleges it. When accidental harm is done, if the action is case, not trespass, it is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part; it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of him who caused it (d).

He must prove not only that defendant was negligent, but also that the defendant's negligence was the cause of the accident (e).

2. *There must be reasonable evidence of negligence for a jury.*—Unless the plaintiff produces reasonable evidence that the accident

(z) *Phillips v. Whiteley, Ltd.* (1938), 54 T. L. R. 379.

(a) *Daly v. Liverpool Corporation*, [1939] 2 A. E. R. 142.

(b) Nevertheless, in the case of *Coggs v. Bernard* (1704), 2 Ld. Raym. 909, an unfortunate attempt was made to introduce into English law the misunderstandings of the Roman law of negligence that were then received among the civilians, and the distinctions then suggested have been repeated from time to time in various judicial *dicta* and numerous text-books. According to this doctrine there are three different kinds or degrees of negligence—ordinary, gross, and slight. Cp. Chitty, *Contracts*, 18th ed., p. 463, n. (n). There are no authorities which compel us to admit that distinctions so vague and impracticable in their nature, so unfounded in principle, and so clearly rooted in historical error as to the rules of Roman law, form any genuine part of the law of England. In *Wilson v. Brett* (1843), 11 M. & W. p. 115, Rolfe, B., observed that he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet", and this observation has been approved by Willes, J., in *Grill v. Iron Screw Collier Co.* (1866), L. R. 1 C. P. p. 612. Cp. *Hinton v. Dibbin* (1842), 2 Q. B. p. 661, *per* Lord Denman; *Austin v. Manchester, etc., Ry.* (1850), 10 C. B. p. 474. But Green says (Judge and Jury, p. 121): "It is hard to understand why so practical an adjustment as the 'comparative negligence' suggestion fell by the way so quickly"; and see Haubury, *Essays*, pp. 150–2, to the same effect. See also Pollock, p. 353; *Street's Foundations of Legal Liability*, Vol. 1, 98. To the contrary effect, see *Giblin v. McMullen* (1868), L. R. 2 P. C. p. 336, *per* Lord Chelmsford; and Beven, *Negligence*, Vol. 1, pp. 15–31.

(c) *Haseldine v. Daw*, [1941] 2 K. B. p. 367, *per* Clauson, L.J. (dissenting).

(d) *Cotton v. Wood* (1860), 8 C. B. (n.s.) at p. 571, *per* Erle, C.J.

(e) *Metropolitan Ry. v. Jackson* (1877), 3 A. C. 193; *Jones v. G. W. Ry.* (1930), 144 L. T. 194; *Glasgow Corporation v. Muir*, [1943] A. C. p. 467, *per* Lord Romer.

was caused by the defendant's negligence, there is no case to go to the jury, and it is the duty of the Judge to enter judgment for the defendant. The preliminary question for the Judge is this: Is the evidence produced on behalf of the plaintiff (including the admissions of the defendant) of such weight that reasonable men (in the absence of, or leaving out of account, any evidence produced by the defendant to the contrary) might come to the conclusion that the accident was caused by the defendant's negligence? If so, the case must go to the jury; if not, judgment must be given for the defendant without the case being submitted to the jury at all. The Court may come to a conclusion upon a reasonable probability, but not on a mere possibility (*ee*). The plaintiff's evidence must pass beyond the region of pure conjecture into that of legal inference (*f*). "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof" (*g*). "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish" (*h*). "In discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue" (*i*).

In thus withdrawing the case from the jury the Judge does not substitute his own opinion as to the proof of negligence for their opinion; he decides, not that negligence has not been proved, but that no reasonable man or jury could think that it had been proved. The Judge may be of opinion that there was no negligence, and yet be bound to leave the question to the jury, because it is one on which reasonable men might reasonably differ (*k*).

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(*ee*) Cp. *per* Goddard, L.J., in *Gibby v. East Grinstead Gas Co.* (1944), 170 L. T. p. 253.

(*f*) *Jones v. G. W. Ry.* (1930), 144 L. T. 194.

(*g*) *S. C.*, p. 202, *per* Lord Macmillan.

(*h*) *Caswell v. Powell Duffryn Collieries*, [1940] A. C. p. 169, *per* Lord Wright.

(*i*) *Parfitt v. Lawless* (1872), L. R. 2 P. & D. p. 472.

(*k*) *Bridges v. North London Ry.* (1874), L. R. 7 H. L. pp. 233-6, *per* Brett, J. On this topic, see Holmes, 12 H. L. R. 443, *Collected Papers*, pp. 233-238; Thayer, *Preliminary Treatise*, ch. 5; C. K. Allen in 36 *Jur. Rev.* 254; Terry, 29 H. L. R. pp. 49-50, *Harvard Essays*, pp. 270-271.



3. It is to be noticed that this question of reasonable evidence is to be decided not by weighing the evidence of the plaintiff against that of the defendant, but by disregarding altogether the evidence of the defendant, and by asking whether that of the plaintiff is, *per se* and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable mind. The task of weighing the evidence on one side against that on the other belongs exclusively to the jury, and the only control exercised over them is the power of the Court to order a new trial when the verdict is against the weight of evidence (l). The judgment of Lord Cairns in *Metropolitan Ry. v. Jackson* (m) is classical authority on the present matter (n): "The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence *ought to be* inferred. . . . It would . . . place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." In the same case (o) Lord Blackburn said that it is for the Judge to determine "whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed" (p).

4. *Illustrative cases.*—In *Wakelin v. London and S. W. Ry.* (q) the dead body of the plaintiff's husband was found lying on the railway line at a level crossing, having been run over by a train which carried a head-light but did not whistle as it approached the crossing. No evidence was produced as to how the deceased came to be on the line. It was held by the House of Lords that there

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(l) See *Dublin Ry. v. Slattery* (1878), 3 A. C. 1155 (where, owing to the course the proceedings took, it was not possible to ask for a new trial on the ground that the verdict was against the weight of evidence, see p. 1162).

(m) (1877), 3 A. C. 193.

(n) (1877), 3 A. C. p. 197.

(o) *Ibid.* p. 207.

(p) "A scintilla of evidence or a mere surmise" will not justify the Judge in leaving the case to the jury: *Toomey v. L. B. & S. C. Ry.* (1850), 3 C. & K. 81; *Jones v. G. W. Ry.* (1930), 144 L. T. p. 203, *per* Lord Macmillan. But the Judge should not rule that there is no case to go to the jury unless counsel for the defendant has said that he is going to call no evidence: *Parry v. Aluminium Corporation* (1940), 162 L. T. 236; *Laurie v. Raglan Building Co.*, [1942] 1 K. B. 152; *Yuill v. Yuill* (1944), 61 T. L. R. 176.

(q) (1886), 12 A. C. 41.

was no case to go to a jury; that even assuming that there was sufficient evidence of negligence (*viz.*, the failure to whistle), there was no evidence that this was the cause of the accident (*r*). In *Cotton v. Wood* (*s*) the plaintiff's wife crossed in front of the defendant's omnibus, but immediately ran back again, because startled by another carriage, and she was then run over by the omnibus. The driver of the omnibus had seen her pass the first time, and then turned round to speak to the conductor, and therefore did not see her return. It was held that there was no evidence of negligence to go to a jury. The driver had no reason to anticipate or guard against the immediate return of a foot passenger who had already safely crossed in front of the horses (*t*).

5. It is important to remember the caution given by Lord Finlay (*u*): "No inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for the propositions of law they contain; and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case." And, as *du Parcq, L.J.*, has pointed out (*v*), there is "danger, particularly in these days when very few cases are tried by juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense". Still less, of course, does the decision of a jury in one case bind another tribunal dealing with somewhat similar facts in another case (*w*).

### § 123. Res Ipsa Loquitur (*x*)

1. *General principle.*—The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; because it

(*r*) With this case should be contrasted *Smith v. South Eastern Ry.*, [1896] 1 Q. B. 178, and *Jones v. G. W. Ry.* (1930), 144 L. T. 194.

(*s*) (1860), 8 C. B. (N.S.) 568. This case might perhaps have been better decided on the ground that the defendant owed no duty of care to the plaintiff.

(*t*) See also *McDowall v. G. W. Ry.*, [1903] 2 K. B. 381; *Crafter v. Metropolitan Ry.* (1868), L. R. 1 C. P. 300; *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652; *Mersey Docks and Harbour Board v. Procter*, [1928] A. C. 253.

(*u*) *Thomson v. Inland Revenue*, [1919] S. C. (H. L.) p. 10. *Cp. Mahon v. Osborne*, [1939] 2 K. B. 14.

(*v*) *Easson v. L. & N. E. Ry.*, [1944] K. B. p. 426.

(*w*) *Carpenter v. Haymarket Hotel*, [1931] 1 K. B. p. 971.

(*x*) Perhaps the best discussion of this subject is by Underhay, 14 Can. Bar Rev. pp. 287—294.

may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule of *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his.

The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. "There must be reasonable evidence of negligence," it is said in *Scott v. London and St. Katherine's Docks Co.* (y), "but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

On the other hand, if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff (z).

There is not, indeed, even where *res ipsa loquitur* any legal presumption of negligence, so that the legal burden of disproving it lies on the defendant. But the plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him (a).

(y) (1865), 3 H. & C., at p. 601.

(z) *Ballard v. N. B. Ry.*, [1923] S. C. 43; *The Kite*, [1933] P. 154; *The Mulvera*, [1937] P. 82; *Duncan v. Cammell Laird* (1944), 171 L. T. p. 195; and see the elaborate discussions of the doctrine by Scott, L.J. (dissenting) in *Mahon v. Osborne*, [1939] 2 K. B. pp. 21-4, and by Atkinson, J., in *Imperial Smelting Corporation v. Joseph Constantine S.S. Line*, [1940] 1 K. B. pp. 828-38. Cp. the similar rules as regards the onus in criminal prosecutions: *Lawrence v. The King*, [1933] A. C. p. 706-7. See on this Bohlen in *Cleveland Bar Lects.* pp. 126-8.

(a) See the valuable judgment of Evatt, J., in *Davis v. Bunn* (1936), 56 C. L. R. 246, at pp. 267-72, and cp. E. R. Thayer, 29 H. L. R. p. 807, *Harvard Essays*, p. 606. On the other hand, the Judicial Committee of the Privy Council in *Winnipeg Electric Co. v. Geel*, [1932] A. C. p. 699, treated the doctrine of *res ipsa loquitur* as analogous to a Canadian statute which placed the onus of proof upon defendants in cases of injury caused by motor vehicles, and so laid

2. *Examples of res ipsa loquitur.*—Thus, in *Byrne v. Boadle* (b) a barrel of flour rolled out of an open doorway on the upper floor of the defendant's warehouse, and fell upon the plaintiff, a passer-by in the street below. It was held that this was sufficient evidence of negligence to go to a jury, without any evidence as to the manner in which the accident happened. For barrels, if properly handled, do not commonly behave in this fashion; and the improbability of such an accident happening without negligence was sufficient to justify a jury in finding that negligence was the cause of it. Again, it is now settled that if a motor vehicle has mounted or is projecting over a pavement or a street refuge there is some evidence of negligence (c), the onus of disproving which will not be displaced merely by proof of a skid (d) unless the defendant can satisfy the Court that the skid was not due to negligence (e). A skid by itself is equivocal. Similarly, after some conflicting dicta (f), it is now clear that unattended horses bolting (g) or unattended motor-cars running down hills (h) afford some evidence of negligence. Other cases in which the same principle has been applied are those in which merchandise, being lowered in a crane, slipped out of its fastenings and fell upon the plaintiff (i); in which a brick fell down from a railway viaduct upon a person in the highway below (k); in which a collision occurred between two trains belonging to the same company (l); in which the door of a railway carriage flew open on being pressed

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down a rebuttable presumption of negligence. Langton, J., in *The Kite*, [1933] P. p. 166, reconciled the two views by treating the onus as less heavy on a defendant under the *res ipsa* rule than it is upon the plaintiff. But if the defendant calls no evidence the jury may be told that "the merest balancing of probabilities in the plaintiff's favour is sufficient to satisfy the onus of proof": per Evatt, J., *loc. cit.* The law in South Africa is as stated in the text: McKerron, p. 47.

(b) (1863), 2 H. & C. 722.

(c) *McGowan v. Stott* (1923), 143 L. T. 217; *Ellor v. Selfridge* (1930), 46 T. L. R. 236.

(d) *Laurie v. Raglan Building Co.*, [1942] 1 K. B. 152; *Liffen v. Watson* (1939), 161 L. T. 351 (reversed on another point: [1940] 1 K. B. 556). See 58 L. Q. R. 155.

(e) *Hunter v. Wright* [1938] 2 A. E. R. 621; *Browne v. De Luxe Car Services*, [1941] 1 A. E. R. p. 384.

(f) *Hammack v. White* (1862), 11 C. B. (N.S.) 588; *Manzoni v. Douglas* (1881), 6 Q. B. D. 145, per Lindley, J.

(g) *Haynes v. Harwood*, [1935] 1 K. B. 146; *Tolhausen v. Davies* (1888), 57 L. J. Q. B. 392; *Gayler and Pope v. Davies*, [1924] 2 K. B. pp. 84-7, per McCaig, J.; *McGowan v. Stott* (1923), 143 L. T. p. 219, per Scrutton, L.J.

(h) *Parker v. Miller* (1926), 42 T. L. R. 408. But see *Martin v. Stanborough* (1924), 41 T. L. R. 1.

(i) *Scott v. London and St. Katherine's Docks Co.* (1865), 3 H. & C. 596.

(k) *Kearney v. London, Brighton, etc., Ry.* (1871), L. R. 6 Q. B. 759.

(l) *Skinner v. L. B. & S. C. Ry.* (1850), 5 Ex. 787.

from within (m); in which an aeroplane met with an accident at the beginning of its flight (n); in which an omnibus brushed against branches of an overhanging tree (o); in which a small sports car turned over and bounded along the road on a dry night (p); in which a dog with a loose lead ran about in a town (q); in which barges sank after being moved and moored (r); in which a swab was left in the patient's body after an operation (s); in which goods were stolen from a bailee's warehouse (t); in which excess sulphites were found in underwear (u). With the application of the principle, of which Lord Shaw said (w) that had it not been in Latin "nobody would have called it a principle", in the case of dangerous chattels we shall deal later (x). On the other hand, it has been held in the Court of Appeal that the electrocution of a man whilst constructing electrical installations does not in itself provide even *prima facie* evidence of negligence (y).

### § 124. Contributory Negligence

1. *Contributory negligence of plaintiff a good defence.*—It often happens that harm is suffered by a plaintiff not solely through the negligence of the defendant, but also through that of the plaintiff himself. If he had used due care for his own safety, he would have come to no harm notwithstanding the negligence of the defendant. In such a case the plaintiff is said to be guilty of contributory negligence, or, more accurately (z), "negligence materially contributing to the injury", and is in general debarred from any action.

Thus, in *Butterfield v. Forrester* (a) the defendant wrongfully

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(m) *Gee v. Metropolitan Ry.* (1873), L. R. 8 Q. B. 161. The principle was, however, not applied in *Easson v. L. & N. E. Ry.*, [1944] K. B. 421, where the locks of the doors were provided (as is usual now) with safety catches and there was no evidence how the door came to be open.

(n) *Fosbrooke-Hobbes v. Airwork, Ltd.*, [1937] 1 A. E. R. 108.

(o) *Radley v. L. P. T. B.*, [1942] 1 A. E. R. 438.

(p) *Halliwell v. Venables* (1930), 143 L. T. 215.

(q) *Pitcher v. Martin* (1937), 53 T. L. R. 908.

(r) *The Mulbera*, [1937] P. 82; *The Quercus*, [1943] P. 96.

(s) *Mahon v. Osborne*, [1939] 2 K. B. 14. Contrast *Morris v. Winsbury White*, [1937] 4 A. E. R. p. 499.

(t) *Brook's Wharf v. Goodman Bros.*, [1937] 1 K. B. pp. 539-40.

(u) *Grant v. Australian Knitting Mills*, [1926] A. C. p. 101.

(w) *Ballard v. N. B. Ry.*, [1923] S. C. p. 56.

(x) *Infra*, s. 149 (6).

(y) *Youngman v. Pirelli Cable Works*, [1940] 1 K. B. 1.

(z) *Caswell v. Powell Duffryn Collieries*, [1940] A. C. pp. 185-6, *per* Lord Porter. Cp. Law Revision Committee's Report, Cmd. 6032, p. 6.

(a) (1809), 11 East 60. This case is commonly cited as the source of the doctrine, but the term "contributory negligence" is not used in it, and the conception is traceable in early law: see Winfield, 451, and *infra*, s. 124 (6).

obstructed a street by placing a pole across it, and the plaintiff rode along the street in the evening, when it was getting dusk, but while there was still sufficient light to notice the obstruction, and coming into collision with the pole he was thrown from his horse and injured. It was held that he had no cause of action, as he could, notwithstanding the defendant's negligence, have avoided the accident by the use of due care. Lord Ellenborough said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

1a. Such is the law at present, but it may well be that by the time this book is printed it will have been changed. In January, 1945, the Lord Chancellor introduced a Bill which, if enacted, will be the Law Reform (Contributory Negligence) Act, 1945. By that Bill it is proposed that "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". The language used is modelled on that of the Law Reform (Married Women and Tortfeasors) Act, 1935, relating to contribution between joint tortfeasors, the decisions upon which would seem to be applicable (aa).

Certain classes of case are exempted from the operation of the Bill—defences arising under a contract, claims under section 1 of the Maritime Conventions Acts (b), claims by a workman or his personal representative or dependant against his employer in respect of damage caused by accident arising out of and in the course of his employment or by an industrial disease, and claims by an employer against his workman in respect of damage caused partly by the fault of the workman arising out of and in the course of his employment (bb).

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(aa) *Supra*, s. 22 (3).

(b) *Infra*, s. 126.

(bb) For the reasons for this last exception, see 199 L. T. 27. The Bill makes special provision for cases where there is an alternative remedy under the Fatal Accidents Acts, 1846 to 1908, where one of the parties pleads the Limitation Act, 1939, where there is a right to an indemnity under s. 30 of the Workmen's Compensation Act, 1925, and where article 21 of the Convention contained in the First Schedule to the Carriage by Air Act, 1932, applies.

2. *Rule extends to unintended consequences of wilful wrongs.*—The rule of contributory negligence determines not merely the liability of the defendant for a negligent wrong, but also his liability for the unintended consequences of an intentional wrong, even of a crime (c). Contributory negligence is not limited to those cases where the defendant is charged with negligence “as though the negligences belong to the same pack and one trumps the other” (cc). Thus, in *Butterfield v. Forrester* (d) itself the defendant who successfully pleaded contributory negligence was sued for a nuisance by obstruction of the public highway.

3. Eminent Judges have said that the law as to contributory negligence is well settled and beyond dispute and that beyond the difficulty of explaining it to a jury in terms of the decided cases its application is plain enough (e). But Sir John Salmond in 1923 wrote (f) that the true nature of the rule was still unsettled and added that “no more baffling and elusive problem exists in the law of torts”. Three main reasons account for the difficulty in ascertaining the law on this subject: (1) The term “contributory negligence” is used in two different senses; (2) questions of fact have been too often treated as questions of law; (3) the doctrine is derived from diverse historical origins.

4. (1) *Two senses of contributory negligence.*—Contributory negligence in the strict sense means negligence of the plaintiff which, combined with that of the defendant, is in law regarded as contributing to the damage: it is part of the *causa causans*. But contributory negligence is often used to cover negligence of the plaintiff which is merely a *causa sine qua non*, and is not regarded in law as part of the cause of the damage, for example, in cases where, in spite of the fact that the plaintiff was negligent, the defendant had the last opportunity of avoiding the accident. In such a case the plaintiff's negligence does not in the eyes of the law “materially contribute” to the damage which he has suffered.

(c) *Caswell's Case*, *supra*, at p. 186.

(cc) *Per* Lord Atkin in *Caswell v. Powell Duffryn Collieries*, [1940] A. C. p. 165. *Cp. supra*, s. 34 (35).

(d) (1809), 11 East 60. See Serjt. Manning's learned note on this case in 1 M. & G. p. 571.

(e) *Radley v. L. & N. W. Ry.* (1876), 1 A. C. p. 758, *per* Lord Penzance; *British Columbia Electric Ry. v. Loach*, [1916] 1 A. C. p. 727, *per* Lord Sumner.

(f) *Preface* to 6th ed., p. viii. *Cp. Wheare v. Clarke* (1937), 56 C. L. R. p. 737, *per* Evatt, J. An undergraduate once got high marks for writing in an examination paper: “Every Judge whom I have met assures me that the law of contributory negligence is perfectly simple, but I notice that they are all reversed on appeal.”

A failure to distinguish between these two senses in which the term has been used has led to a considerable confusion in the authorities. If the plaintiff's negligence is found to have contributed to the accident in the strict sense then both the plaintiff and the defendant are liable to any third party to whom they owed a duty of care who is injured as a result of it (g), but if the negligence of either is a mere *causa sine qua non* then only that party whose negligence is the *causa causans* will be held responsible to a third party (h).

5. (2) *Questions of fact treated as questions of law.*—A large number of cases has been reported which are mere decisions upon the facts of the particular case but which, since they have been reported, have been subsequently treated as if they laid down a rule of law. "In all these cases of negligence", said Lord Wright (i), "whether on sea or land, the decision must be arrived at as a question of fact on all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case." The practice of reporting judgments on questions of fact which are later relied on as laying down rules of law, in spite of warnings and protests from the bench (k), still continues and has been the cause of much error (l).

6. (3) *The historical origin of the rule.*—The present law of contributory negligence is derived from more than one source (m). In particular it embodies two distinct principles which do not always harmonise. The doctrine that if the plaintiff's act was the proximate cause of the damage the plaintiff could not recover was a well-established principle of mediæval law. In the sixteenth

(g) See *Grand Trunk Ry. v. McAlpine* [1913] A. C. 838; *Canadian Pacific Ry. v. Fréchette*, [1915] A. C. 871; *Dew v. United British S.S. Co.* (1928), 139 L. T. 628.

(h) Cp. the valuable anonymous brochure published in Tasmania in 1936: *Contributory Negligence and Third Parties*.

(i) *Heranger S.S. v. Diamond S.S.*, [1939] A. C. p. 101. Cp. *The Eurymedon*, [1938] P. pp. 57-8, per Scott, L.J.; *Stewart v. Hancock*, [1940] 2 A. E. R. p. 431; *Sparks v. Ash, Ltd.*, [1943] K. B. pp. 240-1, per Goddard, L.J. Cp. *supra*, s. 122 (6).

(k) E.g., by MacKinnon, L.J., *S. C.* p. 237. Cp. Lord Simon's warning in *Western Scottish Motor Co. v. Fernie* (1943), 60 T. L. R. 24.

(l) Glaring examples are the cases of vehicles colliding with unlighted obstructions on the highway, see note (f), s. 124 (19), *infra*; *Franklin v. Bristol Tramways*, [1941] 1 K. B. 255 (distinguished in *Sparks v. Ash, Ltd.*, [1943] K. B. 223) and *Bailey v. Geddes*, [1938] 1 K. B. 156 (distinguished in *Chisholm v. L. P. T. B.*, [1939] 1 K. B. 426).

(m) See Winfield, pp. 451-3



and seventeenth centuries the conception of negligence as a ground of liability worked its way into the common law. With the recognition of negligence as a ground of liability a practice grew up of alleging that a plaintiff could not recover because he was debarred by his own negligence. So we find a penal theory of contributory negligence. Thus Lord Halsbury says (n) that if the accident has happened through the joint negligence of both parties, "the plaintiff fails because *in pari delicto potior est conditio defendentis*". In the same way it is common to speak of a plaintiff as being "guilty" of contributory negligence. But the penal theory is inconsistent with the application of the law by the Courts. A plaintiff may have been ever so negligent at some stage of the proceedings, but he will be able to recover if his negligence did not contribute to the accident, even if his negligence was criminal (o). And the penal theory breaks down again in those cases where the defendant had the last opportunity of avoiding the accident. On the other hand, the doctrine of contributory negligence is not merely one application of the rule as to remoteness of damage. Where the acts of negligence are contemporaneous the plaintiff cannot recover, even if the defendant's negligence has been equally a cause of the accident, because he must prove that the negligence of the defendant was the sole cause of the damage (p). The doctrine of contributory negligence in its modern form is anomalous, "because it represents an attempt to piece together two incompatible theories of civil liability—the mediæval theory that liability is based on an act which causes damage, and the modern theory that liability is, as a general rule, based upon some moral fault, either of the negligent or of the intentional variety" (q) (r).

The defence of contributory negligence is not an application of the maxim *Volenti non fit injuria*, although the two principles

(n) *Wakelin v. London and South Western Ry.* (1886), 12 A. C. p. 45. "One may express a doubt whether a negligent plaintiff can be said to have committed a delict at all": *Ellerman Lines v. Grayson*, [1919] 2 K. B. 537, *per* Atkin, L.J.

(o) *Mayor of Colchester v. Brooke* (1845), 7 Q. B. 339. Cp. Bohlen, *Harvard Essays*, pp. 491—492; W. O. Hart in 47 L. Q. R. 110.

(p) See W. Schofield, 3 H. L. R. pp. 267—271, *Harvard Essays*, pp. 547—551; Bohlen, 21 H. L. R. pp. 234—242, *Harvard Essays*, pp. 470—478, *Studies* pp. 501—511.

(q) Holdsworth, H. E. L. viii, p. 462. See on the whole of this section *ibid* iii, 378—382, viii, 459—462.

(r) It has also been suggested that the defence of contributory negligence should be ascribed to the rule which used to deny contribution or indemnity amongst joint tortfeasors. This suggestion was demolished by Schofield, *Harvard Essays*, p. 548, and Bohlen, *Harvard Essays*, pp. 478—479.

often concur and have often been confused. The defence of contributory negligence confesses and avoids a *prima facie* liability, it excludes the idea of deliberation, and relies upon the failure of the plaintiff to exercise reasonable care. Of the defence that the plaintiff has willed to run the risk none of these statements is true. But "to hold that, where the only wrong alleged is the defendant's failure to take care for the plaintiff's safety, the plaintiff's own failure to protect himself debars from recovery, is but a logical and legitimate extension of the conception underlying consent and voluntary assumption of risk—that the plaintiff can ask from others no higher respect for his rights than he himself pays to them" (s).

7. *Causation the basis of the rule.*—The modern tendency is to treat causation as the fundamental conception underlying the doctrine of contributory negligence. We find it said, for example, that the defendant is not liable unless his negligence was a direct cause of the accident, or the immediate cause, or the decisive cause, or the proximate cause, or the real, dominant, efficient, or effective cause, or the substantial cause, or the common-sense cause or the *causa causans* as opposed to a mere condition or *causa sine qua non* (t). Lord Sumner thought that the repetition of such terms without examination in other cases than those in which they had originally been used had often led to confusion and that it might be better "to be content with speaking of the cause of the injury simply and without qualification" (u); and Scott, L.J., confessed "to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense" (v). But

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(s) See Bohlen, *Studies*, pp. 516—529, *Harvard Essays*, pp. 479—491; 21 H. L. R., pp. 243—255.

(t) Cp. *supra*, s. 34 (12). Of these epithets Salmond said (6th ed.), p. 487: "If these terms are used merely as legal nomenclature, and with reference to definite legal principles independently established, they may be unobjectionable. If, however, as usually happens, they are used as if they were themselves illuminative and possessed of some independent logical significance capable of application to the problems of contributory negligence, their use is merely a deceptive substitute for the formulation of definite legal principles."

(u) *British Columbia Electric Ry. v. Loach*, [1916] 1 A. C. p. 728. Cp. *Dew v. United British S.S. Co.* (1928), 139 L. T. p. 635, *per* Sankey, L.J.; *Green, Judge and Jury*, pp. 116—119; Cmd. 6032, p. 7.

(v) *The Eurymedon*, [1938] P. p. 58. So in *Gibby v. East Grinstead Gas Co.* (1944), 170 L. T. p. 253, *du Parcq, L.J.*, said: "Unless the trial had taken place in a university city and it had happened that the jury was composed mainly of philosophers and logicians, I doubt if a discussion of theories of causation would have either assisted or interested them." Cp. *McLean v. Bell* (1932),

the final pronouncement is that of Lord Atkin (*w*): "I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which 'contributes to cause' the injury. . . . And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who 'caused' the injury; and you must not be deterred because the word 'caused' has in philosophy given rise to embarrassments which in this connection should not affect the Judge." "The question is not one of desert or the lack of it", said Lord Sumner (*x*), "but of the cause legally responsible for the injury." The question for the Court to determine is not "Whose fault was it?" (*y*), but "Who caused it?" (*z*).

8. *Inoperative negligence to be distinguished from contributory negligence.*—So the defendant may have been negligent but, if the accident was caused exclusively by the negligence of the plaintiff, it is not a case of contributory negligence at all. The defendant succeeds not by setting off the operative negligence of the plaintiff against his own, but by disproving the operative quality of his own. The driver of a train may have negligently omitted to whistle, but this is not a ground of liability if the plaintiff was so deaf that he could not have heard the whistle in any case (*a*). Conversely, the plaintiff may have been negligent, but unless that negligence was an operative cause of the accident none of the problems connected with contributory negligence arise. He may have been drunk, but if the defendant would have equally run

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147 L. T. p. 264, *per* Lord Wright: "The decision . . . must turn not simply on causation, but on responsibility; the plaintiff's negligence may be what is often called *causa sine qua non*, yet as regards responsibility it becomes merely evidential or matter of narrative, if the defendant acting reasonably could and ought to have avoided the collision." *Cp.* Lord Wright in *Yorkshire Dale S.S. Co. v. Minister of War Transport*, [1942] A. C. p. 706: "This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it."

(*w*) *Caswell v. Powell Duffryn Collieries*, [1940] A. C. p. 165. *Cp.* *Bailey v. Geddes*, [1938] 1 K. B. pp. 165-6, *per* Slessor, L.J.; *Wheare v. Clarke* (1937) 56 C. L. R. pp. 741-2, *per* Evatt, J. See also Winfield, pp. 453-5.

(*x*) *Loach's Case*, *supra*, p. 727.

(*y*) As stated by Henn Collins, J., in *Edwards v. Quickenden*, [1939] P. p. 264. *Cp.* the article by O'Connor, L.J., 38 L. Q. R. p. 24; Lord Hewart, *Essays and Observations*, p. 263.

(*z*) *Cp.* Cmd. 6032, p. 12.

(*a*) *Distinguish Paul v. Great Eastern Ry.* (1920), 36 T. L. R. 344.

him down had he been sober there is no question of contributory negligence (b).

9. *What is contributory negligence?*—Such then are the main causes of the confusion which has prevailed in the law of contributory negligence. With them present to our minds we will endeavour to state the governing principles of this defence. We shall in so doing only speak of negligence which materially contributes to the injury as “contributory negligence”. In determining what is contributory negligence, the same principles apply in general as in determining what is the negligence of the defendant. But, in one respect, there is an important difference. In order to defeat the plaintiff’s claim it is sufficient for the defendant to show that the plaintiff did not take such care as a reasonable man would take for his own safety (c), that to use a phrase of Blackburn, J. (d), he was “negligent as regards himself”, and that he thereby caused or contributed to the injury. The question of contributory negligence does not depend upon any breach of duty as between the plaintiff and the defendant (e). The doctrine cannot, said Atkin, L.J. (f), “be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property”. But a mere error of judgment or heedlessness or inadvertence or carelessness for his own safety is not enough to deprive a plaintiff of his remedy unless it was an effective cause of the injury (g). Again, in many instances the plaintiff has a right to assume that there is no danger. He is not bound to anticipate and provide for the possible negligence of the defendant, but is entitled to take it for granted that the defendant has done all things rightly and carefully. If an accident happens in such a case, the defendant will not be heard to say that the plaintiff might have avoided it by care. Thus, in *Gee v. Metropolitan Ry.* (h) the plaintiff was a passenger on the defendants’ railway, and leaned against the door

(b) *Cp. Lomas v. Jones & Son*, [1944] K. B. pp. 7-8, *per* Goddard, L.J.

(c) *Cp. Lord Atkin in Caswell v. Powell Duffryn Collieries*, [1940] A. C. p. 164.

(d) *Swan v. North British Australian Co.* (1868), 2 H. & C. p. 181. *Cp. Hutchinson v. L. & N. E. Ry.*, [1942] 1 K. B. p. 485, *per* Lord Greene, M.R.

(e) *Grayson v. Ellerman Line*, [1920] A. C. pp. 475-7, *per* Lord Parmoor.

(f) *Ellerman Lines v. Grayson*, [1919] 2 K. B. p. 535. *Contra*, Salmond, 6th ed., s. 9 (3), and apparently the Court of Appeal in *Eys (Joseph), Ltd. v. Reeves*, [1938] 2 K. B. 393, 409-11. But du Parcq, L.J., considers the proposition in the text established: *Lewis v. Denye*, [1939] 1 K. B. pp. 554-5. *Cp. McKerron*, p. 60 and 54 L. Q. R. p. 464.

(g) *Cp. Caswell v. Powell Duffryn Collieries*, [1940] A. C. pp. 174, 179-80, *per* Lord Wright; *Sparks v. Edward Ash, Ltd.*, [1943] K. B. p. 285, *per* Scott, L.J.

(h) (1873), L. R. 8 Q. B. 161.

of the carriage with the intention of looking out of the window. The door had been negligently left unfastened by the defendants' servants, and the plaintiff fell out of the train. It was held that the defendants were liable; for although the plaintiff could easily have avoided the accident by the simple precaution of examining the door-handle, he was entitled to rely on the carefulness of the defendants. So the driver of a motor-car who enters a cross-roads when the traffic lights are in his favour is entitled to assume that another vehicle will not be entering the cross-roads in disobedience to the red light (*i*). So also if the defendant keeps a coal-plate or the covering of a cellar-opening in the pavement, the plaintiff is entitled to step upon it in reliance on the due fulfilment of the defendant's duty to keep it securely fastened, and is not bound to ascertain whether it is safe (*k*). So also if the plaintiff has been misled by the defendant's express or implied representation that there is no danger (*l*). Again, there is no duty owed to anticipate that another party will be negligent, and to avoid the effects of that negligence by anticipation (*m*).

So also a plaintiff is not necessarily guilty of contributory negligence simply because he has knowledge of a danger which the defendant has wrongfully created, but chooses to run the risk rather than to forgo the exercise of his liberty of action (*n*). Similarly if the plaintiff is invited or ordered by the defendant to run the risk in question he cannot be held guilty of contributory negligence in doing so (*o*).

10. *The doctrine of alternative danger.*—Moreover, where the plaintiff is suddenly put in a position of imminent personal danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and self-control in attempting to avoid that danger as may reasonably be expected of him in the circumstances. What

(*i*) *Eva (Joseph), v. Reeves*, [1938] 2 K. B. 399. Cp. *Bailey v. Geddies*, [1938] 1 K. B. 186, as explained in *Wilkinson v. Chetham-Strode*, [1940] 2 K. B. p. 331, and *Chisholm v. L. P. T. B.*, [1939] 1 K. B. 426.

(*k*) See *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658.

(*l*) As in the "invitation to alight" cases: *Bridges v. North London Ry.* (1874), L. R. 7 H. L. 213. Contrast *Sharpe v. Southern Ry.*, [1925] 2 K. B. 811. See also *N. E. Ry. v. Wanless* (1874), L. R. 7 H. L. 12; *Mercer v. S. E. Managing Committee*, [1922] 2 K. B. 549, and contrast *Kerry v. Electrical Engineering Co.* (1940), 163 L. T. 97.

(*m*) *Grayson v. Ellerman Line*, [1920] A. C. 466; *Compania Mexicana v. Essex Transport Co.* (1929), 141 L. T. p. 115, per Russell, L.J.

(*n*) *Clayards v. Dethick* (1848), 12 Q. B. D. 439; *The Highland Loch*, [1912] A. C. 312. See s. 8 (7), *supra*; Winfield, 462.

(*o*) See, for example, *Yarmouth v. France* (1889), 19 Q. B. D. 647, s. 8 (8), *supra*.

is done or omitted to be done in "the agony of the moment" cannot fairly be treated as negligence (*p*). "It is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger" (*q*). So in *Jones v. Boyce* (*r*), in a coach accident, the plaintiff was placed by the negligence of the defendant in a perilous alternative—to jump or not to jump. He jumped, and was injured. Had he kept his seat he would have escaped. But he was able to recover from the defendant, for he had acted reasonably and not from a rash apprehension of danger. The Courts do not demand of the plaintiff the care of a superman, but of a man of ordinary nerve and presence of mind. The same rule is applied in cases of collisions at sea, and is known as the rule in *The Bywell Castle* (*s*). We have already seen (*t*) that the same principle is applied in determining remoteness of damage.

This principle was further extended by Swift, J., in *Brandon v. Osborne, Garrett & Co.* (*u*) to cover the case of a plaintiff acting instinctively not for her own preservation, but for the preservation of her husband. Owing to the negligence of one of the defendants' workmen, some broken glass fell upon the plaintiff's husband, causing him a severe shock. She was herself standing in a place of safety but instinctively clutched her husband and tried to pull him from the spot, and in so doing injured her leg. It was held that she had not been guilty of contributory negligence in acting as she did, having regard to the frightening nature of the accident. She had acted as a reasonable person would have done. If in such a case the plaintiff has acted deliberately under the compulsion of a legal or moral duty the defendant's negligence will be held to be the cause of the accident (*w*).

This doctrine of "the agony of the moment" operates in favour of the defendant as well as of the plaintiff (*x*).

Lord Sumner has said that the doctrine of alternative danger refers to personal danger, and has not been extended to danger to property (*y*). But there seems no reason why the principle should

(*p*) *Jones v. G. W. Ry.* (1930), 144 L. T. p. 201, *per* Lord Warrington.

(*q*) *U. S. Shipping Board v. Laird Line*, [1924] A. C. p. 291, *per* Lord Duncedin.

(*r*) (1816), 1 Starkie 493.

(*s*) (1879), 4 P. D. 219.

(*t*) *Supra*, s. 34 (27).

(*u*) [1924] 1 K. B. 548.

(*w*) *Haynes v. Harwood*, [1935] 1 K. B. 146. *Vide supra*, ss. 8 (5), 34 (27).

(*x*) *Swadling v. Cooper*, [1931] A. C. p. 9; *McLean v. Bell* (1932), 147 L. T. p. 263.

(*y*) *Singleton Abbey (Owners) v. Paludina (Owners)*, [1927] A. C. p. 28.

be so limited, and there is authority for saying that it is of general application (z).

11. *Contributory negligence of children*.—When the plaintiff is a child or other person under some form of personal incapacity, it is sufficient if he shows as much care as a person of that kind may reasonably be expected to show; and he will not lose his remedy merely because a person of full capacity might by using greater care or skill have avoided the accident (a).

Thus, in *Lynch v. Nurdin* (b) the defendant negligently left his horse and cart unattended in the street, and the plaintiff, aged seven, climbed into it, while another boy made the horse move on, and so caused the plaintiff to fall out and suffer injuries. It was held that the defendant was liable. So in *Harrold v. Watney* (c) the defendant occupied land adjoining the highway and surrounded by a fence which was rotten and dangerous, and therefore a nuisance to the highway. The plaintiff, a boy aged four, climbed upon the fence in order to look over it, and the fence fell with him and injured him, and he was held to have a good cause of action against the defendant (d). But there will be no liability to the child in such cases unless the thing through which the accident happens is likely to attract children to intermeddle with it and is dangerous if intermeddled with. So in *Donovan v. Union Cartage Co.* (f) where a child of seven years climbed on to an unhorsed van which had been left unattended in a street and fell and was injured it was held that the defendants were not liable. Even if the van was a nuisance there was no relation of cause and effect between the nuisance by obstruction of the highway and the occurrence of the accident.

12. *The rule in Davies v. Mann*.—In determining whose negligence caused the injury the leading case is *Davies v. Mann* (g). The facts of the case were that the plaintiff negligently left his donkey, with its legs tied, in the highway, and the defendant sub-

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(z) *Wilson v. United Counties Bank*, [1920] A. C. p. 125, per Lord Atkinson; *Adams v. Lanes & Yorkshire Ry.* (1869), L. R. 4 C. P. p. 742, per Montague Smith, J.; S. C. p. 743, per Brett, J.

(a) *Plantza v. Glasgow Corporation*, [1910] S. C. 786, Ct. of Sess.

(b) (1841), 1 Q. B. 29.

(c) [1898] 2 Q. B. 320.

(d) See also *Jewson v. Gatti* (1886), 2 T. L. R. 441; *Corporation of Glasgow v. Taylor*, [1922] 1 A. C. 44. For a discussion and fuller explanation of these cases, see Cl. & L., pp. 304-5, and Greer, L.J., and Slessor, L.J., in *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. pp. 122-123, 128-130.

(f) [1933] 2 K. B. 71.

(g) (1842), 10 M. & W. 546.

sequently came past some little way behind his waggon which owing to his negligence ran over the donkey. It was held that the defendant was liable—withstanding the fact that the accident would not have happened but for the negligence of the plaintiff—on the ground that the defendant had a sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (h). In this case the expression "contributory negligence" was not used, nor is it clear whether the defendant did or did not see the ass; he probably did see it but too late (i). The rule in *Davies v. Mann* was approved and applied by the House of Lords in *Radley v. London & N. W. Ry.* (l). It does not appear that the rule in *Davies v. Mann* will be affected if the Law Reform (Contributory Negligence) Bill (ll) becomes law.

13. *Contemporaneous negligence.*—If the opportunities of the plaintiff and defendant were contemporaneous, as when two persons driving in opposite directions in the middle of a road at night and without lights come into collision with each other, there is no liability on either side. An action by either may be met by a plea of contributory negligence (m).

In *Admiralty Commissioners v. S.S. Volute* (n) the House of Lords considered in the case of a collision at sea whether it was necessary in order that this rule should apply that the negligent acts should be absolutely coincident in time. In applying this rule the Court must not take a microscope to find a period at which A's negligence has ceased and after which B's negligence has begun. Were that done, the cases of contributory negligence would be few and the application of the doctrine to collisions on land or at sea rare, as Lord Birkenhead pointed out in *Admiralty*

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(h) *S. C.* p. 549.

(i) *The Eurymedon*, [1938] P. p. 52, *per* Slessor, L.J.; *cp.* Cmd. 6032, p. 8. See also *Hughes v. Sheppard* (1940), 163 L. T. p. 180.

(l) *Radley v. L. & N. W. Ry.* (1876), 1 A. C. 754. See also *Tuff v. Warman* (1858), 5 C. B. (n.s.) 573; *Grayson, Ltd. v. Ellerman Line, Ltd.*, [1920] A. C. 466.

(ll) *Supra*, s. 124 (1a). See on this point the Preface to this edition.

(m) See *The Bernina* (1887), 12 P. D. at p. 88, *per* Lindley, L.J.; *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A. C. p. 196, *per* Lord Birkenhead; *Swadling v. Cooper*, [1931] A. C. 1 p. 10.

(n) [1922] 1 A. C. 129, 137, 144.



*Commissioners v. S.S. Volute* (n). He added (in a speech warmly approved by the other members of the House), "the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles, as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution" (o) (p). In that case a collision occurred between the *Radstock*, a destroyer, and the *Volute*, a merchant ship under convoy. The collision was due to the fault of the *Volute* in changing her course without giving the proper whistle-signal, and to the immediately subsequent fault of the *Radstock* in increasing her speed with knowledge of the danger caused by the *Volute's* change of course. It was held that both ships were to blame, and that both were responsible, although the last opportunity of avoiding the collision was with the *Radstock*. There was not "a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision". If there is a sufficient separation of time, place and circumstance no case of contributory negligence arises and whoever had the later opportunity of avoiding the accident will be deemed to have caused it.

14. *The test of the last opportunity.*—The rule in *Davies v. Mann* has been somewhat inaptly called the "last opportunity rule" or "the rule of the last clear chance". But "in truth there

(o) A case of contribution in Admiralty is a case in which neither party if plaintiff will succeed at common law—a case of contributory negligence in the strict sense. *Vide infra*, s. 126.

(p) Cp. *Swadling v. Cooper*, [1931] A. C. 1. In another connection Lord Sumner said (*Clan Line Steamers v. Board of Trade*, [1929] A. C. p. 530): "The temptation is always strong to resort to a minute analysis of the circumstances of a casualty, in order to place the cause as proximately to the conclusion of them as possible. . . . I think, however, that Lord Bacon's warning against inquiry into the causes of causes applies equally forcibly to a microscopic analysis of the incidents of a casualty as a means of discovering the proximate cause. This phrase appears to me to apply equally to an infinitely intensive analysis as to an infinite historical retrospect." But for another view see McKerron, p. 74. For the difficulties pointed out by Salmond, see 6th ed., pp. 53-4.

is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong? ” (q).

15. *Last opportunity not the only test.*—It is tempting to conclude “that the last act or omission in point of time is of necessity not only the last link in the chain of causation but the determining factor in the result, since, *ex hypothesi*, but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link ” (r). Though the last opportunity in most cases is a useful guide, it does not always provide the decisive test for determining whose negligence contributed to or caused the accident, even when it is not necessary to take a microscope to discover a separation of time, place or circumstance. This is shown by the decision of the Judicial Committee of the Privy Council in *British Columbia Electric Ry. v. Loach* (s). The facts of the case were as follows: An action was brought against a railway company by the administrator of a man who, while being driven in a waggon across a level-crossing, was run down and killed by an electric car. The deceased was guilty of negligence in failing to look out for the car before entering upon the line (t). The company was also guilty of negligence in running the car at an excessive speed and with a defective brake. The driver saw the horses as they came into view from behind a shed, when they were ten or twelve feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing, and if the brake had been in good order he could have stopped the car in 300 feet. In fact, however, the brake was out of order, and the car overran the crossing and

(q) Law Revision Committee's Report: Cmd. 6032, p. 16.

(r) *The Eurymedon*, [1938] P. p. 58, *per* Scott, L.J. Cp. p. 59. So Goddard, L.J., in *Duncan v. Cammell Laird* (1942), 171 L. T. p. 199, said that the decision of the House of Lords in *Yorkshire Dale S.S. Co. v. Minister of War Transport*, [1942] A. C. 691, “explodes the test of the last opportunity being decisive. It shows that scientific or metaphysical considerations as to causation are not to be considered”, citing Lord Wright at p. 706.

(s) [1916] 1 A. C. 719. In spite of some doubts expressed (see 9th ed., s. 126 (5), n. (l)), it is now accepted that *Loach's Case* is good law in England: *McLean v. Bell* (1932), 147 L. T. p. 264, *per* Lord Wright; *The Eurymedon*, [1938] P. p. 54, *per* Slessor, L.J.

(t) The case, as Scrutton, L.J., pointed out in *Compania Mexicana de Petroleo v. Essex Transport Co.* (1929), 141 L. T. p. 112, is a “very odd” one, because it suggests that a passenger is bound to take extraordinary precautions to see that the road is clear. Yet a passenger is no longer identified with his driver (*vide infra*, s. 125). The fact that the deceased was a passenger escaped Lord Wright in his judgment in *McLean v. Bell* (1932), 147 L. T. p. 264. See McKerron, p. 72, n. 48.

ran the waggon down. The Judicial Committee held the railway company liable, notwithstanding the negligence of the deceased.

16. *Opportunity which the defendant would have had but for his own negligence.*—From *Loach's Case* it appears that a last opportunity which the defendant would have had but for his own negligence is equivalent in law to one which he actually had (u). He will not be suffered to say that he had not the last opportunity, if he would have had it had he not disabled himself by some prior act of negligence. He who drives a cart when drunk, and collides with another vehicle, which he would have had the last opportunity of avoiding if he had been sober, will not be allowed to excuse himself on the plea that in fact he had no such opportunity, because at the critical time he was lying helplessly drunk and asleep at the bottom of his cart. So in *Loach's Case* the deceased's waggon got upon the crossing, and the deceased had become helpless accordingly, at a time when the electric car was still so far distant that it could have been stopped if the brake had been in order. It is instructive to compare with *Loach's Case* the case of *The Eurymedon* (w). In that case *The Corstar* was lying with effective anchor lights exhibited athwart the fairway of the Thames in an improper position. *The Eurymedon* should have realised on seeing the lights the possibility that they were those of a ship unexpectedly ahead and should have reduced speed immediately. The Court of Appeal held that the resulting collision was caused by the combined negligence of both ships. In *Loach's Case* the negligence of the deceased (as pleaded) was spent whilst the electric car was still 400 feet away (x), whereas the *Corstar's* negligence continued to mislead the *Eurymedon* until it was too late for the latter by the exercise of reasonable care to avoid the collision (y).

17. *Where one party alone knows the danger.*—Again, where the defendant alone actually knows or ought to have known (z) of the danger, and fails to use due care to avoid it, he is liable, even to a negligent plaintiff, who had, in fact, the

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(u) Cp. *Wheare v. Clarke* (1937), 56 C. L. R. pp. 739-44, per Evatt, J. MacIntyre, after a full analysis, concludes that *Loach's Case* is an example of comparative negligence, of the "greater fault theory": 53 H. L. R. 1226, p. 1249. Cp. Holdsworth, H. E. L. viii, p. 462.

(w) [1938] P. 41. Cp. *Norwegian Shipping Mission v. Behenna* (1943), 169 L. T. 191, and see 60 L. Q. R. 15.

(x) As in *Davies v. Mann*, see Slessor, L.J., in *The Eurymedon*, at p. 53.

(y) See also *Neenan v. Hosford*, [1920] 2 Ir. R. 258.

(z) *The Eurymedon*, [1938] P. pp. 49-50, per Greer, L.J.

last opportunity (a). For example, the driver of a tramcar sees a foot-passenger crossing the street in front of the car, and obviously inattentive and oblivious of danger. There is still time to stop the car. The driver, however, takes no action, and leaves the dreamer to look after himself. If he is run down, the owners of the tramway will be liable; yet the last opportunity was with the plaintiff. He could have stopped and kept off the rails at the last moment, when the driver could no longer have stopped the car. In such cases also the plaintiff's negligence does not in a legal sense contribute to or cause the accident (b). Similarly if the plaintiff alone knows or ought to have known of the danger the defendant's negligence is not the cause of the damage (c).

18. *Burden of proof of contributory negligence on defendant.*—The burden of proving the negligence of the plaintiff and that it contributed to the damage lies upon the defendant (d). It is not for the plaintiff to prove as part of his own case that he used due care, but for the defendant to prove that the plaintiff did not. And this is so notwithstanding the fact that under the old system of pleading the defence of contributory negligence was raised not by a special plea, but under the general issue.

19. Nevertheless, if on the undisputed facts of the case the only rational inference is that the plaintiff was guilty of contributory negligence—so that a verdict to the contrary would be set aside as against the weight of evidence—it has been held that it is the duty of the Judge to withdraw the case from the jury and give judgment for the defendant (e). But it can seldom be safe for a Judge to act on this principle (f). If, however, there is any dispute

(a) McKerron has suggested that this is the true justification of *Loach's Case* and is the idea underlying the decision in that case: see McKerron, pp. 70–3.

(b) *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, [1924] A. C. p. 420, *per* Lord Shaw; *Paul v. G. E. Ry.* (1920), 36 T. L. R. 344.

(c) *The Vectis*, [1929] P. p. 219, *per* Hill, J.; *The Bernina* (1887), 12 P. D. p. 61.

(d) *Heranger (S.S.) v. Diamond (S.S.)*, [1939] A. C. 94, 104, and 9th ed., s. 125 (5) n. (g).

(e) This rule is ultimately based upon Lord Hatherley's dissenting speech in *Dublin Ry. v. Slattery* (1878), 3 A. C. 1155, p. 1168. The rule seems now to be well established, see, e.g., *Coyle v. G. N. Ry.* (1887), Ir. R. 20 C. L. 409; *Sharpe v. Southern Ry.*, [1925] 2 K. B. 311. But it leads to a curious result. Although the Courts can upset a perverse verdict of "no negligence" as against the weight of evidence, they cannot direct an affirmative verdict of negligence. They can apparently direct an affirmative verdict of contributory negligence. See *Tilley* in 51 L. Q. R. 500, and 9th ed., s. 125 (6) n. (r).

(f) *Cp. Laurie v. Raglan Building Co.*, [1942] 1 K. B. 152. In several cases (e.g. *Tart v. Chitty & Co.*, [1938] 2 K. B. 453; *Baker v. Longhurst & Sons*, [1938] 2 K. B. 461; *cp. as to South Africa, McKerron*, p. 66) the Courts held

as to the facts from which the inference of contributory negligence is to be drawn, the issue must be left to the jury, whatever may be the preponderance of the weight of evidence in favour of the defendant. The remedy of the plaintiff in case of a perverse verdict in these circumstances is an application for a new trial (*g*). If the defendant has succeeded in proving contributory negligence, the plaintiff, however slightly to blame he may have been, however little that blame may have contributed to causing the result, is able to recover nothing—a “harsh and often cruel” principle as Scott, L.J., has described it (*h*). There will be few to lament if this harsh and often cruel rule has been relegated to the museum of antiquities by the passage of the Law Reform (Contributory Negligence) Bill (*hh*) before this book appears.

20. *Proper direction to jury.*—We have already seen (*i*) that the main difficulty in connection with the doctrine of contributory negligence is the explanation of it to the jury in the terms of decided cases. The House of Lords in *Swadling v. Cooper* (*k*) made a distinct contribution to the satisfactory working of this

that a motorist who is injured as the result of running into an unlighted vehicle at night is, as a matter of law, unable to recover. He is in a dilemma. “Either he was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out. In either event he was guilty of negligence.” But in the more recent case of *Tidy v. Battman*, [1934] 1 K. B. 319, it was held in the Court of Appeal that no principle of law could be extracted from those cases. Each case depends on its own facts. See also *Stewart v. Hancock*, [1940] 2 A. E. R. 427. In *Ware v. Garstang Haulage Co.*, [1944] K. B. 30, in similar circumstances the defence does not appear even to have been raised, counsel admitting that he had no answer to the suggestion that an unlighted vehicle was an obstruction on the highway and as such an actionable nuisance. If this be correct the above cases seem to have ignored the decisive fact. See 60 L. Q. R. 8. But it has since been held by the Court of Appeal in *Mailand v. Raisbeck*, [1944] K. B. 689, that no general proposition can be deduced from the *Garstang Haulage Co.’s Case*. *Vide supra*, s. 57 (2). See 61 L. Q. R. p. 8; 56 Jur. Rev. p. 167.

(*g*) As to the whole matter, see *Skelton v. L. & N. W. Ry.* (1867), L. R. 2 C. P. 631; *Dublin, etc. Ry. v. Slattery* (1878), 3 A. C. 1155; *Wakelin v. L. & S. W. Ry.* (1886), 12 A. C. 41; *Coyle v. Gt. N. Ry.* (1887), Ir. R. 20 C. L. 409.

(*h*) *Sparks v. Edward Ash, Ltd.*, [1943] K. B. p. 230. Until 1842 juries appear to have been allowed to divide the damages: *Raisin v. Mitchell* (1839), 9 C. & P. p. 617; *Smith v. Dobson* (1841), 3 M. & G. 59. See 53 H. L. R. pp. 1229–30. One of the advantages of the adoption of the Admiralty rule (*infra*, s. 126 (2)) would be that the Court would be freed “from an undue temptation to shut its eyes to minor degrees of negligence, involving, as is often the case under the half and half rule, an unjust degree of punishment”: *The Eurymedon*, [1938] P. p. 60, *per* Scott, L.J. Cp. Law Revision Committee’s Report, Cmd. 6032, p. 16. The half and half rule was the Admiralty rule until 1911: *infra*, s. 126 (3).

(*hh*) *Supra*, s. 124 (1a).

(*i*) *Supra*, s. 124 (3).

(*k*) [1931] A. C. 1.

branch of the law in practice. In that case there was a collision between a motor car and a motor cycle at a cross-roads, and the trial Judge, Humphreys, J., left to the jury the question: Whose negligence was it that substantially caused the injury? Lord Hailsham, in a speech in which all the other members of the Court concurred, held that in the circumstances of the case that was a sufficient direction. It was manifest, he said (l), that a full discussion even of the leading cases and the judgments delivered in them "would be wholly inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated; but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine" (m).

### § 125. Contributory Negligence of Plaintiff's Servants and Agents

1. *Contributory negligence of plaintiff's servants.*—The contributory negligence of a servant of the plaintiff is a good defence, in the same cases and to the same extent as that of the plaintiff himself, whenever the plaintiff would have been responsible for that negligence of his servant had harm ensued from it. In other words, the rule that the negligence of a servant in the course of his employment is imputed to his master is applicable when the master is a plaintiff no less than when he is a defendant. Presumably the same principle applies to other forms of vicarious liability (n).

(l) At p. 10.

(m) Lord Hewart, C.J., in *Hargrove v. Burn* (1929), 46 T. L. R. 59, a collision case, gave a considered direction, obviously intended as a model, with the result that the jury disagreed. In *Cooper v. Swadling*, Scrutton, L.J., stated ([1930] 1 K. B. p. 406) what in his opinion the direction should be: "If you think that the plaintiff was negligent, but that the defendant, after the plaintiff was negligent, could by taking reasonable care have avoided him, then the plaintiff's negligence is not as a matter of law negligence which contributes to the accident so as to prevent the plaintiff from recovering." Greer, L.J. (at p. 411), said he could not improve upon those words. In *Strauss v. Crocker* (1931), 71 L. J. (N.) p. 255, Scrutton, L.J., said he still adhered to the principle he had laid down in *Cooper v. Swadling*.

(n) *The Bernina* (1888), 13 A. C. p. 16, per Lord Watson.

2. *Contributory negligence of independent contractors.*—The contributory negligence of an independent contractor or other agent of the plaintiff for whom he is not responsible, on the other hand, is no bar to the plaintiff's action. If a cab hired by the plaintiff comes into collision with another vehicle by the negligence of both drivers, and the plaintiff is hurt, he can recover damages not only from his own driver, but also from the other. It was for some time, indeed, believed on the authority of *Thorogood v. Bryan* (o) that this was not so, and that the negligence of the driver of a vehicle was imputed by law to the passenger in such sort that the passenger lost his remedy against third persons. This unreasonable doctrine, sometimes known as "the doctrine of identification", was overruled by the House of Lords in *The Bernina* (p).

3. *Children in charge of adults.*—In *Waite v. North Eastern Ry.* (q) it was held that a child was disentitled to sue for personal injuries caused by the negligence of a railway company, because of the contributory negligence of the adult in whose charge the child was at the time of the accident, both child and adult being passengers on the defendants' railway. This case, though not expressly overruled by *The Bernina*, is now no longer law (r). Children are not the only persons who are incapable of taking care of themselves. "Is such a person to be debarred from recovering compensation if he has been injured by an accident brought about by the combined negligence of the person in whose care he was and a third person? If the accident was due solely to the negligence of the person in whose care he was, there seems to be no doubt that he could recover compensation from that person. If the accident was due solely to the negligence of the third person there is no doubt that he could recover compensation from the third person. It would indeed seem very odd that if the accident was due to the combined negligence of both, he should be without remedy" (s).

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(o) (1849), 8 C. B. 115.

(p) (1888), 13 A. C. 1. Nor is the bailor of a chattel precluded by the contributory negligence of his bailee from recovering damages from a third person by whose negligence the chattel has been injured or destroyed: *Wellwood v. King*, [1921] 2 Ir. R. 274.

(q) (1858), E. B. & E. 719.

(r) The case may be justified, however, on the ground that the adult's negligence was the sole cause of the accident. See the full discussion of the case in *Contributory Negligence and Third Parties*, pp. 52-63.

(s) *Oliver v. Birmingham and Midland Omnibus Co.*, [1933] 1 K. B. p. 41, per Macnaghten, J. "Combined negligence" presumably means contributory negligence in the strict sense. See *Contributory Negligence and Third Parties*, p. 62.

In *Oliver v. Birmingham and Midland Omnibus Co.* (t) it was held that he was not. The fact, however, that the child is in the charge of an adult may in certain cases exempt the defendant from a duty which would otherwise exist of care towards the child—the defendant being entitled to assume that the child will be duly protected by its adult guardian, and therefore is not in danger. In other words, the guardianship of an adult can never excuse the negligence of the defendant towards the child, but it may disprove the existence of any such negligence.

### § 126. Contributory Negligence and Collisions at Sea

1. *Where both ships to blame, liability divided in proportion to degrees of fault.*—The foregoing rules as to contributory negligence are subject to important modifications in their application to collisions at sea. The general rule of maritime law is that when a collision between two ships is caused by the fault of both of them, each is liable for a certain proportion of the damage suffered by the other. The remainder of the damage so suffered lies where it falls. This division is made in the same proportions as those in which the vessels are found to be respectively in fault. The greater the degree of fault, the greater the share of liability. If, however, it is not possible to establish different degrees of fault, the liability is apportioned equally.

2. *Comparison with rule of common law.*—The reason for this rule is that since both parties are in fault both should suffer, and to this end the damages should be apportioned between them. This principle is probably a nearer approximation to ideal justice than the rule of the common law, which in such a case deprives both parties of any remedy at all, and allows the whole of the loss to lie where it falls. By the maritime rule no one can cause loss to another by negligence without having to pay for it; neither can he suffer loss by his own negligence without having to pay for it. He has to make good a fair proportion of the loss which he has brought upon the other, and he has to bear a fair proportion of the loss which he has brought upon himself (u). But by the common law a defendant may by his negligence cause serious

(t) [1933] 1 K. B. 35.

(u) "It is a question of the degree of fault . . . a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations." Therefore an appellate Court should not interfere, save in very exceptional circumstances: *The Macgregor*, [1943] A. C. p. 201, per Lord Wright.



damage to the plaintiff, and may suffer none himself, and may yet go free because of some contributory negligence on the part of the unfortunate plaintiff, who has done harm to no one but himself (w).

The Law Revision Committee in 1939 recommended the adoption of the Admiralty rule in all cases; in other words that it should be a general rule that where damage has been caused by the fault of two or more persons the tribunal trying the case (whether Judge or jury) should apportion the liability in the degree in which each party is found to be in fault (x). That recommendation has received wide approval (y) and Scott, L.J., has said that "a bill to carry the advice into effect would be non-contentious and universally welcomed even during the war" (z). It would bring our law into line with that of most countries outside the influence of English law (a). This happy consummation, advocated by Sir John Salmond, will have been achieved by the time this book sees the light, if the Law Reform (Contributory Negligence) Act, 1945, is then to be found amongst our Statutes (aa).

3. *History of rule.*—The principle of maritime law above stated was established for the first time by the Maritime Conventions Act, 1911 (b). Prior to the passing of that Act the matter was governed by the principle long since established in the Courts of Admiralty,

(w) See the criticism of the common law rule by Lindley, L.J., in *The Bernina* (1887), 12 P. D. p. 88.

(x) Eighth Report: Cmd. 6032, p. 19.

(y) *E.g.*, *Wilkinson v. Chetham-Strode*, [1940] 2 K. B. pp. 332-3, *per* Goddard and Scott, L.J.J.; *Caswell v. Powell Duffryn Collieries*, [1940] A. C. p. 166, and *supra*, s. 124 (19) n. (h). Salmond advocated such a change in the law, Preface to 6th ed., p. ix. On the alleged dangers if such legislation is introduced see Macdonald in 18 Can. Bar Rev. pp. 555-563; Cmd. 6032, p. 17.

(z) *Sparks v. Edward Ash, Ltd.*, [1948] 1 A. E. R. p. 10. Yet in *Gibby v. East Grinstead Gas Co.* (1944), 170 L. T. 252, the same learned Lord Justice said that "the rule of law which we call contributory negligence is not unsympathetic or unjust".

(a) Cp. Law Revision Committee's Report: Cmd. 6032, p. 17; Lawson in J. C. L., November, 1940, p. 143. He says the chief argument in favour of the doctrine of common fault is not so much logic as convenience.

(aa) *Supra*, s. 124 (1a).

(b) S. 1: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally." Under this Act "in fault" means in fault as regards the collision. If the vessel was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration: *The Peter Benoit* (1915), 114 L. T. p. 152, *per* Lord Sumner, adopting the judgment of Pickford, L.J. No craft propelled by oars is a "vessel" within the Act: *Edwards v. Quickenden*, [1939] P. 261.

in accordance with which the damage was always divided equally between the two vessels in fault irrespective of any difference in the degrees of fault attributable to those vessels. Before the Judicature Act, 1873, this Admiralty rule applied only in the Courts of Admiralty; a collision case in the Courts of common law was governed by the ordinary law of contributory negligence. By the Act last mentioned this conflict of law was abolished, and it was provided that the Admiralty rule should apply in all Courts "in any cause or proceeding for damages arising out of a collision between two ships" (c).

4. *Same rule applies to loss of cargo.*—The rule as to division of liability applies to claims by the owners of cargoes lost by collision as well as to claims by the shipowners themselves (d).

5. *Claim of an innocent ship against two ships in fault.*—The rule as to division of liability does not apply as between an innocent ship and two other ships by whose combined fault the innocent ship has been injured. In such a case the innocent ship can recover the whole of its loss from either of the ships in fault (e). The damages so paid by either of the ships is, as between these ships, apportionable in proportion to the degrees of their negligence (f).

6. *Loss of life and personal injuries caused by collision.*—The rule as to division of liability does not apply to damages for loss of life or personal injuries suffered by persons on board ship in collisions due to the fault of both vessels. Before the passing of the Maritime Conventions Act, 1911, liability in this class of cases was governed by the ordinary law (g). By section 2 of that Act, however, it is now provided that where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels the liability of the owners of those vessels is joint and several. That is to say, each of the vessels is liable for the whole of the loss in the same manner as in the case of joint torts at common law. In such cases,

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(c) Judicature Act, 1873, s. 25 (9). This provision is now superseded by the Maritime Conventions Act, 1911; see s. 9. Under the later Act the Admiralty rule is not confined to collisions: *The Cairnbahn*, [1914] P. 25; *The Batavier III* (1925), 134 L. T. 155 (damage by wash caused by excessive speed). The Act does not apply to a Dock Board whose employees by their negligent directions contribute to cause a collision: *The Rockabill*, [1937] P. 93.

(d) Maritime Conventions Act, 1911, s. 1; *The Umona*, [1914] P. 141.

(e) *The Devonshire*, [1912] A. C. 634.

(f) *The Cairnbahn*, [1914] P. 25.

(g) *The Bernina* (1888), 13 A. C. 1.

however, it is provided by section 3 of the Act that there shall be a right of contribution between the owners of the vessels in proportion to the respective degrees of fault, so that if the owners of one vessel pay damages which exceed the proportion in which that vessel was in fault, they may recover the excess from the owners of the other vessel (*h*).

7. *The rule in Davies v. Mann applicable to collisions at sea.*—Notwithstanding the general principle of division of loss, it was settled before the passing of the Maritime Conventions Act, 1911, that the rule in *Davies v. Mann* (*i*) applied to collisions at sea no less than to collisions on land. The Admiralty rule that the loss is divided when both ships are to blame applied only when the circumstances were such that at common law neither party could recover anything from the other. *Davies v. Mann* excluded the Admiralty rule that the loss was to be divided, just as it excludes the common law rule that the loss is to lie where it falls (*k*) (*l*).

It was at one time doubted whether the Maritime Conventions Act, 1911, had the effect of abrogating the application of the rule in *Davies v. Mann* to collisions at sea (*m*). It is now clear that it did not (*n*).

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(*h*) As to the period of limitation, *vide supra*, s. 38 (5).

(*i*) *Supra*, s. 124 (12).

(*k*) *The Sans Pareil*, [1900] P. 267.

(*l*) See also *The Margaret* (1884), 9 A. C. 873; *The Monte Rosa*, [1893] P. 23, *The Vectis*, [1929] P. 204.

(*m*) Sir John Salmond held that it had that effect: 6th ed. pp. 53-4. Cp. *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A. C. p. 136.

(*n*) *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, [1924] A. C. 406; *The Vectis*, [1929] P. 204.

## CHAPTER XV

**LIABILITY TO PERSONS INJURED ON  
DANGEROUS PREMISES (a)**

## § 127. Introductory

1. *Dangerous premises.*—The principles discussed in this chapter apply not only to landed property but also to chattels, such as ships (b), railway trains (c), or other transport, for example, lifts (d), and the appliances upon it, such as ladders (e), of which the plaintiff has been invited or allowed to make use (f).

2. *Liability of owners and of occupiers of premises.*—In dealing with dangerous premises it is necessary to distinguish between the responsibilities of the owner and those of the occupier or possessor. Generally speaking, liability in such cases is based on occupancy or control, not on ownership. The person responsible for the condition of the premises is he who is in actual possession of them for the time being, whether he is the owner or not. For it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons (g). We shall reserve till later consideration of the case of the owner who is not himself in occupation.

(a) Injuries suffered as a result of the dangerous state of premises by persons who have not entered upon the premises fall within the tort of nuisance, *supra*, ch. viii, and are governed by different principles. It is essential to bear in mind the distinction between these two classes of wrongs. Cp. *Bromley v. Mercer*, [1922] 2 K. B. 126; *supra*, s. 74 (8).

(b) *Duncan v. Cammell Laird* (1943), 171 L. T. p. 190, *per* Wrottesley, J. (but see Lord Greene, M.R., on appeal, at p. 192); *Marney v. Scott*, [1899] 1 Q. B. 986 (ladder on a ship); *Heaven v. Pender* (1883), 11 Q. B. D. 508 (stage outside a ship).

(c) *Readhead v. Midland Ry.* (1869), L. R. 4 Q. B. 379, 385.

(d) *Haseldine v. Daw*, [1941] 2 K. B. 343, 358. There is no difference in law between horizontal and vertical transport.

(e) *Woodman v. Richardson and Concrete*, [1937] 3 A. E. R. 866; *Oliver v. Saddler & Co.*, [1929] A. C. 584 (slings).

(f) Lord Wright said in *Glasgow Corporation v. Muir*, [1943] A. C. p. 462, that in cases of "invitation" the duty most commonly had reference to the structural condition of the premises, but might clearly apply to the use which the occupier or other person in control of the premises permits a third party to make of them. But this analogy is not of general application. Thus injuries caused by the dangerous structural condition of a vehicle must be distinguished from injuries caused by an act of negligence during transit of a vehicle: *Haseldine v. Daw*, [1941] 2 K. B. 373, *per* Goddard, L.J. Cp. *Radley v. L. P. T. B.* (1942), 166 L. T. 285.

(g) Cp. *Duncan v. Cammell Laird* (1943), 171 L. T. p. 190, *per* Wrottesley, J. (but see Lord Greene, M.R., on appeal at p. 192); *Taylor v. Sims and Sims* (1942), 167 L. T. 414.

8. It must not, however, be supposed that the occupier of premises is the only person who can be responsible for dangers which there exist. Whoever by a positive act of negligence or wilful misfeasance creates a source of danger on the premises is responsible to those who lawfully enter on those premises and thereby come to harm. So *Banks, L.J.*, said: "If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning. There may be cases in which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence" (h). Thus, in *Parry v. Smith* (i) the defendant was a gasfitter who was employed by the occupier of a house to make certain alterations to the gas-fittings on the premises. The defendant's servant, in executing the work, caused, by his negligence, a leak of gas, which resulted in an explosion by which the plaintiff, a servant of the occupier, was injured and it was held that the defendant was liable. He was guilty of more than a mere passive failure to fulfil his contract with the occupier; he was guilty of a negligent act of misfeasance towards the plaintiff and all other persons whom he thereby exposed to danger. *Dominion Natural Gas Co. v. Collins* (k) is a similar decision of the Privy Council on facts which are practically the same.

4. *Persons entering under contract with occupier and without contract.*—Persons entering on premises in the occupation of another person are of two kinds: (1) Those who enter in pursuance of a contract between themselves and the occupier. The law as to these probably strictly pertains to the law of contracts and not that of torts (l). (2) Those between whom and the occupier there exists

(h) *Kimber v. Gas Light and Coke Co.*, [1918] 1 K. B. p. 445.

(i) (1879), 4 C. P. D. 325.

(k) [1909] A. C. 640. The judgment proceeds, it is true, upon the suggested distinction between "articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*", and articles of a more harmless description. Upon this, *vide infra*, s. 149 (5). Cp. also *Canter v. Gardner & Co.* (1939), 56 T. L. R. 305; *Burnham v. Boyer*, [1936] 2 A. E. R. 1165, and see generally on this topic, Bohlen, *Studies*, 156.

(l) Cp. *Maugham, L.J.*, in *Marshall v. Lindsey C. C.* (1935), as reported in 152 L. T. p. 431. But see *Lindsey C. C. v. Marshall*, [1937] A. C. pp. 118-4, 121, and *Friedmann* in 21 Can. Bar Rev., p. 82.

no such contractual relation. These fall into three categories. They may go to the premises (a) by the invitation, express or implied, of the occupier; (b) with the leave and licence of the occupier; and (c) as trespassers (m). The law relating to them is only "a special sub-head of the general doctrine of negligence" (n), but it is a sub-head with special rules of its own.

The law on the whole subject is still in a confused state. The delimitation between the different categories is far from settled, nor is it possible to state with certainty the duties owed to persons falling within those categories. Had it been earlier and more generally recognised that the topic is only one branch of the law of negligence it might have been seen that the occupier's duties cannot conveniently be put into strait jackets to fit the character in which the plaintiff comes on to the premises and the law would then have been freed of some needless refinements and profitless distinctions (o).

### § 128. Contractual Liability of Occupiers

1. *Liability determined by express or implied terms of contract.*—Where there is a contract between the plaintiff and the defendant in pursuance whereof the plaintiff has entered upon premises in the defendant's occupation, the responsibility of the defendant for the safe condition of those premises and his liability for any injury suffered by the plaintiff in consequence of dangers encountered by him there depend on the express or implied terms of the particular contract. The parties are, of course, at liberty to make such express bargain as they please as to the responsibility for accidents happening on the premises; and where express provision has been so made, there is no difficulty except that of interpreting it and applying it to the facts. But commonly there is no such express term in the contract, and responsibility is left to be determined by such term as the law implies in contracts of the particular kind. No single and universal rule can be laid down as to the nature and measure of such implied duty and responsibility. One class of contract differs from another. It is for the Court and not for the

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(m) *Addie v. Dumbreck*, [1929] A. C. p. 364, *per* Lord Hailsham, L.C.; *Ellis v. Fulham B. C.*, [1938] 1 K. B. p. 233, *per* MacKinnon, L.J.

(n) *Glasgow Corporation v. Muir*, [1943] A. C. p. 461, *per* Lord Wright. *Cp. Haseldine v. Daw*, [1941] 2 K. B. p. 355, *per* Scott, L.J. Pollock, p. 407 regards the doctrine as separated from the ordinary law of negligence, which is inadequate to account for it. *Cp. Winfield*, p. 601.

(o) *Cp. Green, Judge and Jury* (pp. 127—136); *Friedmann*, 5 *Mod. L. R.* 244—5. In 21 *Can. Bar Rev.* 79, he has made some useful suggestions for the clarification and simplification of the law. *Contra*, Landon in *Pollock*, p. 423, n. (s).

jury to imply the terms in a contract (p). Although the matter is not absolutely free from doubt (q), it would seem that the invitor for payment will never be implied absolutely to warrant the safety of the invitee (r). "It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe" (s). "There cannot be an obligation to guard against that which cannot reasonably be assumed to be likely to happen" (t).

2. *Contractual obligations involving liability for independent contractors.*—The leading case as to such an implied warranty is *Francis v. Cockrell* (u). The defendant, being in occupation of a racecourse, contracted with a builder for the erection of a stand thereon. The plaintiff purchased from the defendant a ticket entitling him to enter the stand in order to see the races. Through the negligence of the contractor the stand was improperly constructed, and during the races it fell and injured the plaintiff. It was held by the Court of Exchequer Chamber that the defendant was liable, although guilty of no negligence.

In *Maclean v. Segar* (w) this rule was applied by McCardie, J., to the case of a guest in an hotel who was injured in a fire due to the defective construction of the premises. The general principle is there formulated in words which have since been adopted in the Court of Appeal (x) as follows (y): "Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any

(p) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B., pp. 213, 222, per Scrutton and Greer, L.JJ.

(q) Cp. S. C. p. 213, per Scrutton, L.J. In *Silverman v. Imperial London Hotels, Ltd.* (1927), 137 L. T. 57, Swift, J., obiter, in accordance with the general principles of contract law, treated the obligation as absolute. See 21 Can. Bar Rev. p. 50.

(r) *Readhead v. Midland Ry.* (1869), L. R. 4 Q. B. 379.

(s) *Hall v. Brooklands*, [1933] 1 K. B. p. 223, per Greer, L.J.

(t) S. C. p. 229, per Greer, L.J. Cp. p. 231.

(u) (1870) L. R. 5 Q. B. 184, 501.

(v) [1917] 2 K. B. 325.

(w) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 223, per Greer, L.J.

(y) P. 332.

person concerned with the construction, alteration, repair, or maintenance of the premises; and the headnote to *Francis v. Cockrell* must to this extent be corrected. But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises" (2). So in *Lindsey C. C. v. Marshall* (a), where the plaintiff contracted puerperal fever in a maternity home through being put, owing to the negligence of the medical officers, in a room which had not been successfully disinfected, Lord Hailsham, L.C., said that the defendants were liable for the mistakes of their agents (b) (c).

3. *Contractual obligations not involving liability for independent contractors.*—In other classes of contracts the implied term is more limited. Where the use of the premises is only ancillary to the main purpose of the contract the liability of the occupier is assimilated to that of his liability to an invitee of which we shall treat in the next section. So in *Gillmore v. L. C. C.* (d), where the plaintiff was injured through slipping on a very highly polished floor at a physical training class to join which he had paid a fee to the defendants, it was said by du Parcq, L.J., that the defendants impliedly warranted that they had taken reasonable care to see that the premises were in all respects reasonably safe for the purpose for which the plaintiff had been invited to use them. It seems that in such cases the occupier is liable only for dangers the existence or continuance of which is due to the negligence of himself or his servants. So the lessee of a theatre is probably governed by the rule in *Francis v. Cockrell* as regards injuries

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(2) See also *Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board*, [1918] 2 K. B. 381; *Brannigen v. Harrington* (1921), 37 T. L. R. 349.

(a) [1937] A. C. 97.

(b) At p. 107. Cp. Lords Sankey and Macmillan (at pp. 115, 119). Lord Wright, at p. 125, probably *per incuriam*, gave as analogous an illustration of a licensee. In *Weigall v. Westminster Hospital* (1936), 52 T. L. R. 301, where a mother was visiting her son in a room, for which she had paid, in a nursing home, Slesser, L.J., regarded her rights as arising from an implied term in her contract with the hospital. Scott, L.J., seems to have thought that there was no difference between contractual liability and liability to an invitee, and Eve, J., regarded the mother as a licensee merely.

(c) Part of the confusion of the law on this topic is due to the fact that the Courts have not always kept distinct the contractual liability of an occupier from his liability to an invitee: cp. *Campbell v. Shelbourne Hotel*, [1939] 2 K. B. p. 537 (guest at an hotel treated as an invitee); *Glasgow Corporation v. Muir*, [1943] A. C. pp. 462-6. And see *supra*, n. (b) and 21 Can. Bar Rev. pp. 81-2.

(d) (1938), 159 L. T. 615.



caused by structural defects (e). But as regards injuries caused by the negligence of the actors his obligation varies according as to whether he himself produces the play or not. If he produces the performance himself, then he takes upon himself all the responsibility for the negligence of the actors, even though not in fact his servants. But if he does not provide the actors and scenery, his obligation does not extend beyond the state of the premises, meaning the structure, and reasonable care that an intrinsically dangerous performance shall be carefully performed (f). But in neither case is there any obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk (ff). The measure and limit of the duty and responsibility of an employer towards his own servants in respect of the dangerous condition of the premises on which they are employed is determined by the rules governing the relationship of master and servant which we have already considered (g) (h).

4. *Plaintiff's knowledge of danger not per se a defence.*—Where the occupier is thus bound by his contract to use reasonable care to keep the premises safe, and an accident happens to the other party to the contract by reason of his failure to do so, it is not in itself any defence to the occupier that the injured party had full knowledge or warning of the danger and voluntarily ran the risk.

Thus in *Dunster v. Hollis* (i) the defendant let rooms in a building to the plaintiff but retained in his own possession the common stairway of the building. He thereby impliedly undertook towards the plaintiff a duty of care in respect of the safe condition of that stairway as the agreed means of access to the rooms so let. In

(e) *Winfield*, p. 605.

(f) *Cox v. Coulson*, [1916] 2 K. B. 177; *Sheehan v. Dreamland, Margate, Ltd.* (1928), 40 T. L. R. 155; *Fraser-Wallas v. Waters*, [1939] 4 A. E. R. 609. *Welsh v. Canterbury and Paragon, Ltd.* (1894), 10 T. L. R. 478 (spectator injured by Blondin, a tight-rope performer, dropping a chair upon her) cannot be supported in view of the later decisions.

(ff) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 217, *per* Scrutton, L.J. But see *infra*, s. 139 (2), n. (g).

(g) *Supra*, s. 28. See *Cole v. De Trafford* (No. 2), [1918] 2 K. B. p. 537, *per* Scrutton, L.J.; *Naismith v. London Film Productions* (1939), 162 L. T. 136; *Davidson v. Handley Page, Ltd.* (1944), 61 T. L. R. p. 179, *per* Lord Greene, M.R.

(h) For the obligation imposed upon the lessor who retains a common staircase in his own control, *vide infra*, s. 130 (1).

(i) [1918] 2 K. B. 795. *Cp.*, in a case of master and servant, *Williams v. Birmingham Battery Co.*, [1899] 2 Q. B. 398, where the defendants were held responsible for the death of a workman who had fallen from an elevated tramway which he had used in the course of his employment with full knowledge of its dangerous character. See s. 8, *supra*.

breach of this duty he allowed the stairway to fall into a dangerous condition of disrepair. This condition was visible and obvious and was well known to the plaintiff. Nevertheless, he was held entitled to recover damages for an accident which befell him through the use of the stairway.

5. *Indirect operation of plaintiff's knowledge of danger.*—Although the plaintiff's knowledge of the existence of a danger due to a breach by the defendant of his contractual obligation to make the premises safe is not in itself a defence to the occupier, it is not wholly immaterial. It may operate in more than one manner to exonerate the defendant :

(a) It may be sufficient evidence of an implied agreement by the plaintiff to take the risk upon himself—that is to say, to excuse the defendant from the performance of his duty to make the premises safe. *Volenti non fit injuria*. Whether such an agreement really exists, however, is a question of fact for the jury (ii). To know of a breach of duty is not necessarily to excuse it (j).

(b) Knowledge of a danger may be evidence of contributory negligence on the part of the person injured by it. Acts which would be reasonable on the part of a person ignorant of a danger may be acts of contributory negligence on the part of one who is well aware of it (jj).

(c) A danger may be of such a nature that it ceases to be a danger to those who know of it. In respect of such dangers, therefore, there is no difference between the duty of making premises safe and the duty of giving warning that they are dangerous. By giving such warning the occupier fulfils his whole duty of preventing the existence of danger. Machinery in motion or an unfenced opening in the floor of a building may be no danger at all to those who use the building with full knowledge, but may constitute a serious menace to those who enter in ignorance. But a decayed and rotten floor or staircase is a danger even to those who use it with full knowledge.

6. In cases in which the defendant has protection under a con-

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(ii) It is for the Court to determine the nature of the term to be implied, which may include the question as to whether the plaintiff consented to the risk, *supra*, s. 128 (1), but it may still remain a question of fact for the jury whether knowledge of a particular defect amounts to consent. See s. 8 (3) and 8 (7), n. (b). Cp. *Letang v. Ottawa Electric Ry.*, [1926] A. C. 725; *Gillmore v. L. C. C.* (1938), 159 L. T. 615.

(j) *Supra*, s. 8 (6) and (7).

(jj) *Supra*, s. 8 (8).

tract, the plaintiff may not disregard the contract and allege a wider liability in tort (*k*).

### § 129. Liability of Occupiers to Invitees

1. *Invitees and licensees.*—Entry by permission of the occupier is of two kinds. Using the established language of the authorities on this matter, the permission amounts either to an invitation or to a mere license. A person invited to enter is commonly referred to as an invitee, or a licensee with an interest (*kk*), while he who is merely licensed to enter is distinguished as a licensee or a bare licensee. The distinction is established by the leading case of *Indermaur v. Dames* (*l*), and has been recognised in a long series of subsequent cases. As the authorities stand, however, the distinction is vague and unsatisfactory, both in respect of its nature and in respect of its consequences. A licensee may be defined as a person who enters on the premises by the permission of the occupier, granted gratuitously in a matter in which the occupier has himself no interest. The typical example is a gratuitous license to use a way across the occupier's land for purposes which exclusively concern the licensee himself. Another example is the case of a guest receiving hospitality in a private house (*m*). An invitee, on the other hand, is a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier has himself some pecuniary or material interest. He is a person who receives permission from the occupier as a matter of business and not as a matter of grace (*n*). An invitation is a request to enter for the purposes of the occupier; a license is a permission to enter for the purposes of the entrant himself. The invitor says: "I ask you to enter upon my business." The licensor says: "I permit you to enter on your own business" (*o*).

(*k*) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K. B. p. 213, *per* Scrutton, L.J. *Supra*, s. 3 (3).

(*kk*) *E.g.*, in *Hayward v. Drury Lane Theatre*, [1917] 2 K. B. 899; *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746. Neither of these "nicknames" is very fortunate: see *Haseldine v. Daw*, [1941] 2 K. B. p. 350, *per* Scott, L.J.; *Ellis v. Fulham B. C.*, [1938] 1 K. B. p. 233, *per* MacKinnon, L.J. See also *Howard v. Furness Houlder*, [1936] 2 A. E. R. p. 787.

(*l*) (1866), L. R. 1 C. P. 274; 2 C. P. 311.

(*m*) *Cp. Pitt v. Jackson*, [1939] 1 A. E. R. p. 132. But contrast *Griffiths v. Smith*, [1941] A. C. 170.

(*n*) *Cp. Lord Buckmaster in Fairman v. Perpetual Investment Building Society*, [1923] A. C. p. 80.

(*o*) MacKinnon, L.J., in *Ellis v. Fulham B. C.*, [1938] 1 K. B. p. 234, cited the above passage as "the best definition". In *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. p. 272, Lord Sumner said "invitor and invitee have a

2. *Duty of an occupier to an invitee.* The rule in *Indermaur v. Dames*.—We proceed to consider the measure of the duty which an occupier owes to an invitee (p). The duty differs from that owed in the normal case of contractual liability in that the occupier is not, according to the generally accepted view, liable for the negligence of an independent contractor in respect of the structural condition of the premises (q), though as regards things to be done on the premises (other than structural repairs) to keep them safe he cannot by delegating the performance to an independent contractor escape liability, except in those cases where the performance of the duty requires some technical knowledge and the occupier would be guilty of negligence if he performed the duty himself without taking and following the advice of an expert.

Thus in *Woodward v. Mayor of Hastings* (qq) it was held that the governors of a school were liable for the failure of a cleaner to brush snow from the school steps, even if she was an independent contractor.

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common interest", and a "joint interest" (*Addie v. Dumbreck*, [1929] A. C. p. 371, *per* Lord Dunedin) and a "common material interest" (*Ellis v. Fulham B. C.*, *supra*, pp. 219, 228, *per* Greer, L.J.) between invitor and invitee have been said to be essential to create the relationship. *Cp.* *Willes, J.*, in *Indermaur v. Dames* (1866), L. R. 1 C. P. p. 285, *Slessor, L.J.*, in *Weigall v. Westminster Hospital* (1936), 52 T. L. R. p. 302, and *Winfield*, 58 L. Q. R. p. 17. But in *Haseldine v. Daw*, [1941] 2 K. B. p. 352, *Scott, L.J.*, said with good reason: "I see no legal ground for making community of interest an essential criterion. . . . I cannot see how the separate interest of the visitor necessarily affects the duty of the occupier."

(p) The duty owed to an invitee is limited to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so, and to the use of those premises in the ordinary way: *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. 253; *Hillen v. I.C.I. (Alkali)*, [1936] A. C. 65. "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters": *The Carlgarth*, [1927] P. p. 110, *per* Scrutton, L.J. In addition to the *Mersey Docks Case*, plaintiffs in search of a lavatory have provided a surprising number of cases on this point. Contrast *Mersey Docks Case*, *Walker v. Midland Ry.* (1886), 55 L. T. 499, and *Lee v. Luper*, [1936] 3 A. E. R. 817, with *Simons v. Winslade* (1938), 159 L. T. 408, *Campbell v. Shelbourne Hotel*, [1939] 2 K. B. 534, and *Gould v. McAuliffe* (1941), 57 T. L. R. 369, 468, in which cases the plaintiff was held to be an invitee where he was injured. With *Hillen's Case* contrast *Henaghan v. Rederiet Forangirene*, [1936] 2 A. E. R. 1426. *Cp.* also *Humphreys v. Dreamland (Margate)* (1930), 100 L. J. K. B. 137.

(q) *Haseldine v. Daw*, [1941] 2 K. B. pp. 356, 374, *per* *Scott and Goddard, L.J.J.*; *Howard v. Furness Houlder*, [1936] 2 A. E. R. pp. 787-8, *per* *Lewis, J.*; *The Jersey*, [1942] P. p. 127, *per* *Bucknill, J.*; *Clelland v. Edward Lloyd*, [1938] 1 K. B. p. 275. So also *Landon in Pollock*, p. 409, n. (l). *Contra, Wilkinson v. Rea, Ltd.*, [1941] 1 K. B. p. 702, *per* *Luxmoore, L.J.*; *Pollock*, p. 409; *Winfield*, p. 611, and in 57 L. Q. R. p. 306; *Miles in Dig.* 332. See also *Friedmann*, 5 Mod. L. R. pp. 243, 245, and 21 Can. Bar Rev. p. 81. But were the law not as stated the dividing line between the duties owed by an occupier to an invitee and to one within the rule in *Francis v. Cockrell* would be obliterated. Although a multiplicity of distinctions is not a good in itself, in this case the distinction is well recognised by authority.

(qq) (1944), 61 T. L. R. 94.

"The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands". On the other hand, it has been repeatedly recognised that a more extensive duty is owing to an invitee than to a licensee (r). The leading case on this subject is *Indermaur v. Dames* (s), in which the occupier of a factory was held liable to the plaintiff, who was the servant of a gasfitter employed by the defendant, and who, while testing certain gas-fittings on the defendant's premises, fell through an unfenced opening in one of the upper floors. The following passage occurs in the judgment of Willes, J. (t): "It was also argued that the plaintiff was at best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him. We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. . . . The common case is that of a customer in a shop: but it is obvious that this is only one of a class. . . . This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied. And, with respect to such

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(r) *Fairman's Case*, [1923] A. C. p. 80, per Lord Buckmaster. Cp. *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. p. 410, per Hamilton, L.J.

(s) (1866), L. R. 1 C. P. 274; 2 C. P. 311.

(t) L. R. 1 C. P. at pp. 285, 287, 288.

a visitor at least, we consider it settled law, that he, using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer must be determined by a jury as a matter of fact."

3. *Is the duty towards an invitee to make the premises safe or merely to give warning of danger?*—The foregoing passage contains an unfortunate ambiguity. Is the duty of an occupier to an invitee a duty to use care to make the premises reasonably safe, or is it merely a duty to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence? If the latter alternative is correct, the fact that the danger is actually known to the invitee is an absolute bar to any action by him. If, on the other hand, the duty of the occupier is the higher duty of taking care to make the premises reasonably safe, he commits a breach of this duty when he invites persons to enter premises which he knows or ought to know to be dangerous, even though those persons are themselves aware of the danger. It has, however, been suggested (u) that there is no real conflict between the two standards. In *Norman v. G. W. Ry* (w), Phillimore, L.J., said that "reasonably safe" must be taken in the sense, not of reasonably safe absolutely, but of reasonably safe for the plaintiff, and that in analysing the expression one must take into account the personal equation. If it is safe for the plaintiff, he said, it does not matter if it is safe for anybody else. And on that assumption it has been maintained that an adequate warning makes a place "reasonably safe". But the ambiguity has been recognised by authority, and even if we accept Phillimore, L.J.'s dictum as correctly stating the law, the conflict still remains (x). To take a concrete illustration: is a shopkeeper who invites the

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(u) Pollock, 409 and Landon's note (k) *ibid.*; Segar in Bell Yard, May, 1939, pp. 15 *sqq.* Cp. Cl. & L. pp. 592-3.

(w) [1915] 1 K. B. p. 596.

(x) Cp. *per* Scrutton and Lawrence, L.JJ., in *Hillen v. I.C.I. (Alkali)*, [1934] 1 K. B. pp. 466-7, 470. Lord Atkin leaves the question as to which view is correct open in *Hillen v. I.C.I. (Alkali)*, [1936] A. C. p. 69. The American Restatement (s. 343) combines the two views: "Toward the business visitor, the possessor owes the additional duty to exercise reasonable care to make the land safe for the reception of his visitor or, at the least, to ascertain the actual condition of the land so that by warning the visitor thereon, he may give the visitor an opportunity to decide intelligently whether or not to accept the invitation or permission."

public into his shop bound to use due care to provide a stairway reasonably safe for their use, or does he fulfil his whole duty to his customers by supplying a stairway which is visibly and obviously unsafe? (y) On the authorities as they stand it is impossible to answer the question put above with confidence. The Court of Appeal in *Brackley v. Midland Ry.* (z), following a *dictum* of Lord Atkinson in *Cavalier v. Pope* (a), definitely adopted the restricted interpretation of the duty imposed on occupiers towards invitees, and this has been described by Scrutton, L.J. (b), as "the generally accepted view". On the other hand, in *Norman v. Great Western Ry.* (c) the Court of Appeal held that the occupier owed to an invitee the duty of taking care to make the premises reasonably safe, and not merely a duty to warn the invitee that they were dangerous. And this is the way in which the duty is now usually stated (d). In practice the difference of view is seldom important, for no doubt has been cast upon Willes, J.'s statement that an invitee must use reasonable care on his own part for his own safety, and in general if he does he will come to no harm if he has been warned (e). Again, "an invitee who makes an unreasonable use of the premises, and in consequence of such unreasonable use sustains an injury, cannot recover damages against the invitor" (f), nor can he recover if he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it (g).

Even if the occupier's duty is merely a duty of warning, it is greater than his duty to a bare licensee, for it is a duty to warn him of unusual dangers of which he knows or ought to know,

(y) Cp. the facts in *Dunster v. Hollis*, [1918] 2 K. B. 795, where it was said *obiter* that the duty to an invitee was only to warn. *Contra, Letang v. Ottawa Electric Ry.*, [1926] A. C. p. 732. See also Winfield, pp. 613-5.

(z) (1916), 85 L. J. K. B. 1596. See especially *Bankes, L.J.*, at p. 1608.

(a) [1906] A. C. p. 432.

(b) *Hillen v. I.C.I. (Alkali)*, [1934] 1 K. B. p. 466. The duty is so stated by Lord Maugham in *Griffiths v. Smith*, [1941] A. C. p. 182, and by Pilcher, J., in *The Humorist*, [1944] P. p. 30.

(c) [1915] 1 K. B. 584. See the criticism of this case by W. H. Griffith, 32 L. Q. R. 255.

(d) As by Horridge, J., and Slesser, L.J., in *Weigall v. Westminster Hospital* (1935), 51 T. L. R. 554; (1936), 52 T. L. R. p. 303; by Lord Hailsham in *Addie v. Dumbreck*, [1929] A. C. p. 365; and in *Haseldine v. Daw*, [1941] 2 K. B. p. 374, by Goddard, L.J., who seems to have changed his mind as to the duty since his judgment in *Naismith v. London Film Productions*, [1939] 1 A. E. R. p. 798. Cp. also Lord Romer in *Glasgow Corporation v. Muir*, [1943] A. C. pp. 466-7, and Scott, L.J., in *Fryer v. Salford Corporation*, [1937] 1 A. E. R. p. 622.

(e) But see *supra*, s. 128 (4).

(f) *Hillen v. I.C.I. (Alkali)*, [1934] 1 K. B. p. 470, *per* Lawrence, L.J.

(g) *Letang v. Ottawa Electric Ry.*, [1926] A. C. 725. Cp. *supra*, s. 128 (4) and (5).

whereas the duty towards a licensee is merely a duty to warn him of concealed dangers actually known to the occupier—a duty, that is to say, to refrain from wilfully and knowingly leading the licensee into a trap (h). But, even if the occupier's duty is to take reasonable care that the premises are reasonably safe, he is not an insurer and he is not liable unless he ought to have known of the danger to which the plaintiff was exposed (i).

### § 130. Liability of Occupiers to Bare Licensees

1. The leading authority on the position of licensees is the decision of the House of Lords in *Fairman v. Perpetual Investment Building Society* (k).

In that case the defendants were the owners of a block of flats which they let to various tenants, while they themselves retained possession of the common staircase giving access to those flats. The plaintiff was a resident in one of the flats, which was in the occupation of her brother-in-law as a tenant of the defendants. The cement steps of the stairway were in a worn and dangerous condition, and the plaintiff in descending caught her heel in a depression and fell and was seriously injured. In so far as the flats had been let by the defendants they had ceased to be the occupiers thereof, and therefore had the same freedom from responsibility for its safety as in the case of all other owners who are not also occupiers (l). But in so far as they retained possession of the common staircase (though the tenants might have the *use* of it), they remained subject to the ordinary liabilities of an occupier. In such a case, as between himself and his tenant, the landlord's obligation, in the absence of an express or implied agreement, is to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the tenant or to the part of the premises demised (m). He is liable even though the danger was visible and obvious and the tenant had full knowledge of it (n). Where, on the other hand, the person injured is not the tenant himself, but some other person, his rights will depend upon whether he is an invitee, a licensee or a tres-

(h) *Infra*, s. 130.

(i) *Haseldine v. Daw*, [1941] 2 K. B. 356, 369; *Woodman v. Richardson*, [1937] 3 A. E. R. 866; *Simons v. Winslade* (1938), 159 L. T. 408.

(k) [1923] A. C. 74.

(l) *Vide infra*, s. 131.

(m) *Cockburn v. Smith*, [1921] 2 K. B. 119. It was left open whether this duty is to be regarded as contractual or as imposed by law. It would seem to be contractual and to fall within the rule in *Francis v. Cockrell*, *supra*, s. 128 (2).

(n) *Dunster v. Hollis*, [1918] 2 K. B. 795.



passer (*nn*). In *Fairman's Case* (*o*) it was held that the plaintiff was a bare licensee of the landlord and not an invitee, and that she had no cause of action (*p*). From this decision the following conclusions may be drawn as to the liability of an occupier towards a licensee.

2. *Occupier bound to warn licensee against concealed danger.*—The occupier of premises is under no obligation to a licensee to make them safe for use by him. A mere licensee must be content to take the premises as they are (*q*).

This rule, however, is subject to an important qualification. Although the occupier is not bound to use any care to make the premises safe for the use of a mere licensee, he is under an obligation to give warning to such a licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead even a bare licensee into a trap (*qq*). By the term "concealed danger" is meant a danger which in the words of Lord Wrenbury in *Fairman's Case* (*r*) "is not known to the licensee or obvious to the licensee using reasonable care". In an action, therefore, brought by a licensee it is an absolute defence that the danger was actually known to the plaintiff. Even if the licensee does not actually know of the danger, he has no cause of action if the danger was so visible, obvious, or usual on that class of premises (*s*) that a licensee using due care for his own safety would have discovered it for himself before coming to any harm. Against such dangers the occupier is not bound to warn his licensee. The licensee can recover only

(*nn*) For the landlord's liability to persons who are injured on other premises belonging to the same landlord owing to the dangerous condition of the premises leased, *vide infra*, s. 134 (*5*).

(*o*) [1923] A. C. 74. Cp. *Morgan v. Girls' Friendly Society*, [1936] 1 A. E. R. 404.

(*p*) In *Haseldine v. Daw*, [1941] 2 K. B. 343, Scott, L.J. (at pp. 349-53) considered that the expressions of opinion on this point in the House of Lords were *obiter* and not binding, but Goddard, L.J. (at pp. 371-2), thought that they were not *obiter* and reluctantly came to the conclusion that he was bound by them. The same learned Lord Justice, however, in *Fosbrooke-Hobbes v. Airworks, Ltd.*, [1937] 1 A. E. R. p. 112, said that he would "hesitate long before he held that a guest was not an invitee of the proprietor of an aeroplane who had agreed to carry a party of which he was a member". See also Paton in 21 Can. Bar Rev. pp. 518-9, who points out that American authorities support the view of Scott, L.J.

(*q*) *Fairman's Case*, [1923] A. C. p. 95, *per* Lord Wrenbury.

(*qq*) The three preceding sentences were cited with approval by Singleton, J., in *Baker v. Bethnal Green B. C.*, [1944] 2 A. E. R. p. 305.

(*r*) [1923] A. C. p. 96. Cp. *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. p. 274, *per* Lord Sumner.

(*s*) For example, polished linoleum near a bath-room: *Pitt v. Jackson*, [1939] 1 A. E. R. 129.

if he can prove that the occupier led him into a trap by permitting him to enter on premises which, using due care on his own part, he reasonably supposed to be safe (t). Thus in *Fairman's Case*, although the steps were out of repair and therefore dangerous, the danger was open and visible, so that the plaintiff either knew of it or ought to have known of it, for she had used the stairway daily for some months. Therefore, she had no right of action. Again quoting Lord Wrenbury in *Fairman's Case* (u): "Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words 'reasonable care' are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when, if he had been on the alert and had looked, he could have seen them. For instance, if one step in a staircase or one rung in a ladder has been removed in the course of the day, and a man who had used the staircase or the ladder in the morning comes home in the evening, finding the staircase or ladder still ostensibly offered for use, and goes up or down it without looking out for that which no one would reasonably expect—viz., that a step or rung has been removed—he has nevertheless suffered from what has generally been called 'a trap', although if he had stopped and looked he would have seen that the step or rung had been removed. . . . He was entitled to assume that there was no such danger."

3. *Duty of warning extends only to concealed dangers actually known to occupier.*—The duty of an occupier to warn a licensee of concealed danger is limited to concealed danger actually known to the occupier. So Willes, J., in *Gautret v. Egerton* (w), assimilated the law as to bare licensees to that of gifts. "The principle of law as to gifts", he said, "is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable" (x). Though the occupier is only liable for dangers of which he has actual knowledge (y)

(t) These three sentences were quoted with approval by Eve, J., in *Coleshill v. Manchester Corporation*, [1928] 1 K. B. p. 797.

(u) [1923] A. C. p. 96.

(w) (1866), L. R. 2 C. P. 371, 375.

(x) *Cp. Cooke v. Midland Great Western Ry.*, [1909] A. C. p. 238, *per* Lord Atkinson; *Norman v. Great Western Ry.*, [1915] 1 K. B. 591, *per* Buckley, L.J.

(y) There are *obiter dicta* by very eminent Judges which would extend the duty of warning to dangers of which the occupier ought to have known. But it is now

the decision in *Ellis v. Fulham Borough Council* (z) has obscured the boundary line between actual knowledge and means of knowledge. In that case a child, whilst paddling in a pool provided for that purpose by the defendants, in a public park, was injured by some broken glass at the bottom of the pool, the presence of which the defendants in spite of raking had failed to detect. The defendants were held liable on the ground that though they did not know of the presence in the water of the actual piece of glass they did know that there was a danger from glass against which they ought to provide. The danger was obvious to them. In other words, actual knowledge of the possibility of danger was treated as actual knowledge of the existence of the dangerous condition. It has been suggested that this is to say indirectly that the defendants ought to have been aware of the presence of the glass and were for that reason liable (a), but it seems in fact to amount to no more than the proposition that the occupier must not expose the licensee to a risk known to the occupier but not known to the licensee. The converse of this problem is: Is it sufficient to impose liability that the occupier should know the existence of the physical facts which constitute the danger or must he also know that those facts constitute a danger? This question was raised, without being settled, in *Baker v. Bethnal Green B. C.* (aa).

4. *But not limited to dangers created by him.*—*Ellis' Case* makes it clear that the obligation of the occupier is not limited to a duty to warn the licensee against new traps which he has himself created, but extends to all traps existing on the premises, even if the dangerous condition has been created by a third party (b).

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"generally conceded" (*Haseldine v. Daw*, [1941] 2 K. B. p. 372, *per* Goddard, L.J.; *cp.* *Ellis v. Fulham B. C.*, [1938] 1 K. B. p. 221, *per* Greer, L.J., and *Coates v. Rawtenstall Corporation* (1937), 157 L. T. pp. 416, 417) that these statements were made *per incuriam*. But see for a possible explanation Lord Greene, M.R., in *Baker v. Bethnal Green B. C.*, [1945] 1 A. E. R. p. 140. It is unnecessary, therefore, to repeat the discussion of the authorities cited in 9th ed. of this book, s. 135 (4) and n. (g). The confusion may be in part due to the inapt use of the expression "trap" in some of the cases relating to the liability to invitees: see the article by W. H. Griffith in 41 L. Q. R. 255.

(z) [1938] 1 K. B. 212. *Cp.* *Coates v. Rawtenstall Corporation* (1937), 157 L. T. 415.

(a) *Cp.* Friedmann, 21 Can. Bar Rev. pp. 84-5, and Goodhart in 54 L. Q. R. p. 161.

(aa) [1945] 1 A. E. R. 135, at pp. 140, 143.

(b) *Cp.* 54 L. Q. R. pp. 160-1. *Contra*, *Wilson, Sons v. Barry Ry.* (1916), 116 L. T. p. 78, and *Hayward v. Drury Lane Theatre*, [1917] 2 K. B. pp. 913, 914, *per* Scrutton, L.J.; *Coleshill v. Manchester Corporation*, [1928] 1 K. B. p. 792, *per* Atkin, L.J.

5. *Gratuitous contracts of service.*—Sir John Salmond thought that the position of a licensee must be distinguished from that of a person for whom the occupier has undertaken, even though gratuitously, to perform some service : for example, a gratuitous contract of carriage. He thought that such a contract imposes a duty of reasonable care in the performance of it, and that this duty extends to ascertaining the safe condition of the premises on which the contract is to be performed (c). But Goddard, L.J., has expressed the opinion (d) that *Harris v. Perry* (e), the case upon which this proposition was based, is to be explained as a case of negligence in transit, and that a person who gives a lift to a friend in a car, though he must drive with due care, is under no duty to see that his car is in a safe condition before he lets him get in when he has no reason to believe that it is not. And this view seems more consistent with principle.

6. *Duty of occupier to licensee after entry.*—What is the duty of an occupier towards a licensee after he has entered upon the premises? It is clear that he is liable if he knowingly creates a new source of concealed danger and gives no warning of it (f). He is also liable if he or his servants do any positive act of negligent misfeasance by which the licensee suffers harm, as by negligently driving over a person whom he has permitted to use a private way. The licence is granted subject to existing dangers, but no further act must be done by the grantor or his servants to endanger the safety of the person to whom it was given (ff).

### § 131. Liability of Occupiers to Persons Entering as of Right (g)

1. Persons entering as of right but not in pursuance of any contract between the parties have sometimes been regarded as constituting a separate category. It is submitted that there is no need to create such a category. In fact there are at least two distinct classes of such persons : (1) officials or others who in the

(c) This also is apparently the view of Scott, L.J. : *Haseldine v. Daw*, [1941] 2 K. B. p. 358.

(d) S.C. p. 373. Cp. *supra*, s. 127 (1), n. (f).

(e) [1908] 2 K. B. 219. Cp. *Miller v. Liverpool Co-operative Society*, [1940] 4 A. E. R. 367. Salmond also cited *Lygo v. Newbold* (1854), 9 Ex. p. 306, and *Moffatt v. Bateman* (1869), L. R. 3 P. C. 115, the latter of which seems quite irrelevant.

(f) *Corby v. Hill* (1858), 4 C. B. (n.s.) 556.

(ff) *Gallagher v. Humphrey* (1862), 6 L. T. (n.s.) p. 685, *per* Cockburn, C.J.

(g) See Winfield, 616-20; Friedmann in 21 Can. Bar Rev. 859.

exercise of a public duty enter premises; (2) members of the public who, as such, exercise their rights of using land dedicated to public use such as highways, recreation grounds, railway premises, and so forth.

2. *Persons entering in exercise of a public duty.*—Sir John Salmond thought that “on principle, in general an occupier who is bound by statute or otherwise, apart from contract, to permit others to enter upon his premises and to make use of them for any specific purpose, is also bound to use due care to keep those premises reasonably safe for such use. The right to enter the premises is presumably a right to enter them in safety—not merely a right to enter at one’s own risk. . . . Those who enter as of right should be entitled as of right to have the premises made safe for them, and not merely to be warned of danger”. This according to the view which we have adopted is merely the duty to an invitee (*gg*), and it may be taken to be the measure of the duty owed to an official entering in the exercise of a public duty (*h*).

3. *Persons entering on public premises.*—Those who make use of premises open to the public as of right seem to fall into a different category. Maugham, L.J., in *Purkis v. Walthamstow B. C.* (*i*) said that he was inclined to hold that a local authority providing a recreation park had a special obligation to those using it as of right, and that it was their duty “to do something more than . . . that arising from the cold neutrality of a landowner who allows persons to visit his property”, and Greer, L.J. (*k*) inclined to the view that its duty was that of an invitor. But the weight of authority is on the side of those who maintain that such persons are licensees merely (*l*) and MacKinnon, L.J., thinks this “quite clear” (*m*). On the other hand in *Baker v. Bethnal Green B. C.* (*mm*), the case arising from the dreadful disaster when 178 people lost their lives owing to the defective condition of a stair-

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(*gg*) Salmond seems to have inclined to the view that the duty owed to an invitee was merely a duty to warn: 6th ed., s. 122 (10), n. (g).

(*h*) There is no direct authority on this point unless *Fryer v. Salford Corporation*, [1937] 1 A. E. R. p. 622 (girl of eleven attending corporation school), is so understood.

(*i*) (1934), 151 L. T. 30, pp. 34–5.

(*k*) *Ellis v. Fulham B. C.*, [1938] 1 K. B. pp. 220–1.

(*l*) *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44; *Ellis v. Fulham B. C.*, [1938] 1 K. B., pp. 230–1; *Coates v. Rautenstall Corporation* (1937), 157 L. T., p. 417.

(*m*) *Ellis v. Fulham B. C.*, *ubi supra*, p. 234. Cp. *Baker v. Bethnal Green B. C.*, [1944] 2 A. E. R. 301 (air-raid shelter).

(*mm*) [1945] 1 A. E. R. 185.

case in an underground station under construction which the defendants had converted for use as an air-raid shelter, Lord Greene, M.R., suggested and du Parcq, L.J., inclined to the view, without deciding, that those using the shelter were invitees of the defendants, since the defendants had provided the shelter for the public in fulfilling their public duty and that such cases differ from one where a local authority provides a public park. It is submitted, however, that it would be difficult to put that difference into a legal proposition, though it may seem well founded on moral principle and social convenience.

4. *Passengers on a highway.*—Passengers on a highway across land in private ownership stand in a class apart. Apart from statutory modifications of the common law, a highway is merely a public right of way over land which remains in the occupation of the owner of that land. It is well established that such an occupier is under no responsibility as such towards users of the highway for its safety and is not liable for dangers thereon whether they exist at the time of dedication or come into existence later (n). “If I dedicate a way to the public,” says Willes, J., in *Gautret v. Egerton* (o), “which is full of ruts and holes, the public must take it as it is. If I dig a pit in it I may be liable for the consequences, but, if I do nothing, I am not.” This follows from the fact that after dedication the occupier has no duty to keep the highway in repair (p). But if the plaintiff is on a highway or railway premises, not merely as a member of the public, but as an intending passenger or on other business in which the railway has an interest, on general principle he is in the position of an invitee (q).

### § 132. Liability of Occupiers to Trespassers

1. *No duty of care towards trespassers.*—Hitherto we have confined our attention to the rights of persons who lawfully enter on dangerous premises and there come to harm. We have now to

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(n) The occupier is liable of course for acts of positive misfeasance whereby he obstructs the highway or renders it dangerous, and he is also liable for maintaining his adjoining premises in such a dangerous condition as to constitute a nuisance to the highway. (This note was cited with approval in *Wringe v. Cohen*, [1940] 1 K. B., p. 241.) *Supra*, s. 69.

(o) (1867), L. R. 2 C. P. 871, 873; cp. *Brackley v. Midland Ry.* (1916), 114 L. T. pp. 1155-6. And see Winfield, 611.

(p) *S. C.* p. 1156.

(q) *S. C.* (1916), 114 L. T. 1150. Cp. *Norman v. G. W. Ry.*, [1915] 1 K. B. pp. 592-3. In *Mercer v. S. E. Ry.*, [1922] 2 K. B. 649, Lush, J., treated the plaintiff, though merely a member of the public, as an invitee, but it would seem that in the circumstances liability would equally have attached had he been a mere licensee.

deal with the position of mere trespassers. The general principle is that he who enters wrongfully enters at his own risk in all respects. A burglar who breaks his leg by falling down the stairs cannot complain that they were insecure, nor can a beggar recover damages because he is bitten by the dog (r). To a trespasser the occupier owes no duty either to see that his premises are safe, or to give warning of their danger—not even that limited duty of warning which he owes to a bare licensee. Thus in *Grand Trunk Railway of Canada v. Barnett* (s) it was held that a trespasser on a railway train had no right of action for damages for personal injuries caused by collision. And the owner of land upon which there is a continuous trap, such as an innocent-looking pond which contains poisonous matter, is under no duty to warn a trespasser of its true character (t) (u). The law is the same in the case of trespassing animals. In *Ponting v. Noakes* (v) the plaintiff and defendant were adjoining occupiers of land and the defendant had a yew tree growing on his land the branches of which extended close up to the boundary-line but did not cross it. The plaintiff's horse, reaching across the boundary, ate the leaves of the yew tree, and died in consequence. It was held that the defendant was under no liability, since he owed no duty of care in respect of trespassing animals (w).

2. *Intentional harm to trespassers.*—This general principle is subject, however, to two and possibly three qualifications. The first is that an occupier who intentionally harms a trespasser by creating on his premises a source of danger for that purpose is liable for the harm so done, unless the danger so created by him can be justified as being nothing more than a reasonable and therefore law-

(r) *Sarch v. Blackburn* (1830), 4 C. & P. 297; *Murley v. Grove* (1882), 46 J. P. 360; *H.M.S. Glatton*, [1923] P. 215.

(s) [1911] A. C. 861.

(t) *United Zinc and Chemical Co. v. Britt*, [1922] 258 U. S. 268, cited with approval by Scrutton, L.J., in *Mourton v. Poulter*, [1930] 2 K. B. p. 191.

(u) It is, however, actionable to have on one's premises any excavation or other danger so close to the adjoining highway as to interfere with the safety of passengers, even though mischief cannot happen to them except by accidental deviation from the highway and resulting trespass on the defendant's land. *Barnes v. Ward* (1850), 9 C. B. 392; *Owens v. Scott & Sons*, [1939] 3 A. E. R. p. 668. And see *supra*, s. 69 (2), n. (x). The breach of a statutory duty to fence a railway may render the railway company liable for injuries caused to cattle trespassing on the adjoining highway and escaping thence on to the railway: *Parkinson v. Garstang & Knott End Ry.*, [1910] 1 K. B. 615.

(v) [1894] 2 Q. B. 281.

(w) Nevertheless it is an actionable wrong to place anything on one's land for the purpose of attracting and injuring the animals of the adjoining occupier: *Townsend v. Wathen* (1808), 9 East 277.

ful measure of self-defence. "A trespasser is not without rights" (x) nor *caput lupinum* to be treated as the occupier pleases. "A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained" (y). I must not throw stones at a man because he crosses my land without permission; and for the same reason I must not intentionally lay a trap for him whereby he may, when trespassing, bring mischief upon himself (z). I must not shoot him; I must not set a spring gun, "for that is just to arrange to shoot him without personally firing the shot" (a). Thus, in *Bird v. Holbrook* (b) the defendant placed a spring gun in his garden to protect it from the depredations of thieves and trespassers. The plaintiff was a boy who, in ignorance of the fact that any such danger existed, trespassed in the garden in order to recapture a fowl which had strayed there. While so trespassing he was injured by the discharge of the gun, and he was held to have a good cause of action. This case was decided at common law, the cause of action having arisen before the passing of the Act which made the setting of spring guns a criminal offence (c). In the earlier case of *Hlott v. Wilkes* (d) the facts were identical, except that the plaintiff knew of the existence of the danger, and it was held that this knowledge prevented him from having any remedy. It is difficult to see on what principle such a decision can be supported. It seems an anomalous and incorrect application of the maxim *Volenti non fit injuria*. If a man intentionally shoots me, am I debarred from an action because I knew of his intention and faced the risk? Am I guilty of contributory negligence and so deprived of redress because I fail to take sufficient care to avoid a mischief which another has wilfully sought to inflict upon me? (e).

If, however, the source of danger intentionally created on the

(x) *Hillen v. I.C.I. (Alkali)*, [1934] 1 K. B. p. 473, *per* Greer, L.J.

(y) *Barnes v. Ward* (1850), 19 L. J. C. P. p. 200. Here injury must be understood in its strict sense of an actionable wrong.

(z) *Hardy v. G. L. Ry.*, [1920] 3 K. B. p. 473, *per* Scrutton, L.J. Cp. "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground?": *Vere v. Lord Cawdor* (1809), 11 East 568.

(a) *Addie v. Dumbreck*, [1929] A. C. p. 376, *per* Lord Dunedin.

(b) (1828), 4 Bing. 628.

(c) Spring Guns Act, 1826. See now Offences against the Person Act, 1861, s. 31.

(d) (1820), 3 B. & Ald. 304.

(e) See Street's Foundations, Vol. I, p. 69, for American authorities on this point. And see Sidney Smith's violent attack upon *Hlott v. Wilkes* in his *Essays: "Spring Guns and Man Traps"* and "Man Traps and Spring Guns". But Asquith, J., thinks the case still in principle good law: *Dann v. Hamilton*, [1939] 1 K. B. p. 516. So also Pollock, p. 128.



defendant's property is nothing more than a reasonably necessary means of protecting that property from trespass, he is under no liability for injury so suffered by a trespasser. "That you may set traps for trespassers is obvious" (f). Although it is not lawful to defend one's land by means of a spring gun or a mine of dynamite, it is lawful to protect it by means of spikes or broken glass upon the top of a wall (g), or by a barbed-wire fence, or by a dog accustomed to bite mankind (h), unless, presumably, the dog is so savage and so powerful as to be likely to cause serious bodily harm. Whether such lawful dangers are known to the trespasser or not, he has no cause of action for injuries which he receives from them. The distinction seems to be that an occupier is entitled to create dangers whose sole purpose is to emphasise that his property is private, the object being not primarily to injure trespassers, but to show that it is not worth while trespassing. Mr. Hart has called these "deterrent" dangers. But he is not entitled to create "retributive" dangers, *i.e.*, dangers created for the purpose of injuring trespassers, which are not obvious but concealed, especially if hidden within the boundaries of his property. Only that amount of injury produced by a retributive danger is lawful, which could be justified by the occupier had he done it personally and directly to the trespasser (i).

But different considerations arise where a man is entitled to set a trap to injure one man and in order to do so introduces on his land something calculated to cause others serious injury. Then it would seem that, if there is a probability or perhaps even a reasonable possibility that trespassers may come upon the land, even a trespasser, if undesignedly injured, should have a right of action unless he has received adequate notice of the risk he has run. "Although it may be lawful to put these instruments [spring-guns] on a man's own ground", said Bayley, J. (k), "yet as they are

(f) *The Carlgarth*, [1927] P. p. 109, *per* Scrutton, L.J.

(g) *Deane v. Clayton* (1817), 7 Taunt. p. 521.

(h) *Sarch v. Blackburn* (1830), 4 C. & P. p. 300; *Brock v. Copeland* (1794), 1 Esp. p. 203; *Sycamore v. Ley* (1932), 147 L. T. 342.

(i) See Hart's very able article in 47 L. Q. R. 92, at pp. 101-5. The same rule applies to the trespasses of animals. In *Jordin v. Crump* (1841), 8 M. & W. 782, it was held that the setting of dog-spears in a wood for the purpose of killing dogs who there hunted hares was no cause of action at the suit of the owner of a dog which was so killed. But Hart thinks this case unsupportable as dog-spears can only be a "retributive" danger.

(k) *Hott v. Wilkes* (1820), 3 B. & Ald. p. 312. In *Deane v. Clayton* (1817), 7 Taunt. pp. 526-7, 530, Dallas, J., and Gibbs, C.J., held that since it was lawful to place spears for the destruction of foxes there could be no liability if "by possibility and against the original intent, the death of a dog had been induced". This opinion, *quantum valeat*, is against the view taken in the text.

calculated to create great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger." It has even been suggested (l) that in such cases the occupier's duty is to make his land inaccessible by putting up fences, but it would seem that he would fulfil his duty by giving notice of the danger. No such rule, indeed, was recognised by the majority of the Court of Appeal in *Adams v. Naylor* (m) where the plaintiff, when in pursuit of a tennis ball, was injured by the explosion of a mine in a minefield which had been laid for the defence of the realm. In that case the plaintiff failed in his action, but the point now in issue was somewhat obscured by the fact that the plaintiff was a child and that there were circumstances which led Scott, L.J., who dissented, to state that he was a licensee (n). It would in any event presumably be a good defence that the object of the trap would be defeated if notice were given and that it was essential that in the interests of national security notice should not be given.

8. *Duty towards trespassers known to be present.*—A second qualification is that the occupier is probably liable even to a trespasser for positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence. The occupier's exemption from any duty of care to a trespasser applies only to the dangerous state of the premises, not to acts done on the premises with knowledge of the trespasser's presence. He who shoots upon his land owes a duty of care not only to persons lawfully there, but to trespassers whom he knows or ought to have known to be there (o). *A fortiori* such a duty is owed by any one on the land

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(l) *Deane v. Clayton* (1817), 7 Taunt. p. 515, *per* Park, J. Cp., in the case of a child trespasser, *Adams v. Naylor*, [1944] 2 A. E. R. p. 26, *per* Scott, L.J.

(m) [1944] K. B. 750. See Winfield, who takes a different view from that in the text, in 60 L. Q. R. 305.

(n) In *Adams v. Naylor* there had been a substantial fence and danger-notice which had been buried and obscured by blown sand, but this would seem to have been irrelevant in the view of MacKinnon, L.J. In his view notice was immaterial. Morton, J. (pp. 762-3) thought that the plaintiff knew that he was not intended to go into the field where he was injured, but seems to have thought it immaterial whether he knew that there was special danger there. MacKinnon, L.J.'s limitation, at p. 761, of any liability to a trespasser to cases in which the defendant has by his conduct tacitly elevated the intruder to the status of licensee is clearly too narrow.

(o) *Glasgow Corporation v. Muir*, [1943] A. C. pp. 461-2, *per* Lord Wright. Cp. Lord Atkin in *Hillen v. I. C. I. (Alkali)*, [1936] A. C. p. 70. See *Petrie v. Rostrevor Owners*, [1898] 2 Ir. R. 556, and the discussion of this topic by R. J. Peaslee, 27 H. L. R. 408, *Harvard Essays*, 341. See also *American Restatement*, §§ 334-8.

other than the occupier against whom the trespass has been committed. Thus in *Mourton v. Poulter* (p) the defendant was a nurseryman who was felling an elm tree for the occupier of the land. Knowing that when the last root was cut the tree would fall within two minutes, he did not repeat the warnings which he had previously given to children to go away, and the tree fell and injured the plaintiff aged ten. It was held that though the plaintiff was a trespasser he could recover damages from the defendant. A man who "does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near . . . owes a duty to these people even though they are trespassers to take care to give them warning".

This is probably the explanation of two decisions of the House of Lords which are not at first sight easily reconcilable. In *Addie & Sons v. Dumbreck* (q) a boy of four years was killed whilst playing on a wheel, part of a haulage system, in a field belonging to the defendants. The field was surrounded by a hedge which was quite inadequate to keep out the public, and was habitually used by young children as a playground to the knowledge of the defendants' officials who at times warned children out of the field. The wheel was not visible from the electric motor which set it in motion, and the accident occurred owing to the wheel being set in motion by the defendants' servants without taking precaution to avoid accident to persons frequenting the wheel. It was held that the boy was a trespasser, and that the defendants owed him no duty to protect him from injury. In *Excelsior Wire Rope Co. v. Callan* (r) the facts were very similar, but in that case the machinery was only used about three times a week, and the children were only warned off when the machine was going to be set in action. It was well known to the defendants that when the machine was going to start it was extremely likely that children would be there, and, with the wire in motion, would be in grave danger. If the man who gave the signal to start the machinery had looked to see whether any child was playing with the rope he would have seen that the child who was injured had returned to the rope (s).

(p) [1930] 2 K. B. 183, approved in *Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455.

(q) [1929] A. C. 358. Cp. *McLaughlin v. Antrim Electricity Co.*, [1941] N. I. 23.

(r) [1930] A. C. 404.

(s) (1930), 99 L. J. K. B. 380. Cp. Lawrence, L.J., at p. 381. This, which is the all-important fact (cp. Scrutton, L.J., in *Mourton v. Poulter*, [1930] 2 K. B. p. 190), does not appear in the report in [1930] A. C. 404.

Further, the defendants were not occupiers of the land upon which the accident happened, but merely had a licence to have their machinery on the land (t). In this case it was held that the defendants were liable. In both cases the person who started the machinery knew that children were likely to be about, so that apparently it cannot be said that the liability of the occupier to the trespasser depended on that fact. But in *Addie's Case* the people who set the wire rope in motion were down a hill at a place from which they could not see the wheel and the children who were beside it, while in the *Excelsior Wire Rope Co's Case* the man who gave the signal to start the wheel was standing only about twenty yards away from it, and could have seen it and the children if he had looked round without moving from his position (u). In the latter case the trespassers, even if they were not, ought to have been known to have been present; where knowledge of their presence was so easy to obtain it was reckless not to obtain it before acting. In the former case it could not be said to be reckless not to take the steps necessary to discover their presence. And Lord Dunedin's statement that to trespassers "there is no duty, save only that of not inflicting malicious injury" (w), must be taken to be limited to cases in which the trespasser is not nor ought to have been known to be present.

But the landowner is still not liable to a trespasser where there is a continuing trap, even though it be dynamic, as in the case of the moving staircase on the underground railway in *Hardy v. Central London Ry.* (x). It is submitted that if the defendants in that case had suddenly started the escalator without warning they would have been liable (y).

3a. It is submitted that it is open to the House of Lords to hold that where a man engages upon his land in operations which are unusually dangerous to third persons or where, even without intending to cause harm to any one, he introduces on to his land something which is likely to cause serious bodily hurt to third

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(t) It has been suggested that this is the best distinction between the two cases. See the discussion in the ninth edition of this work, pp. 528-30.

(u) See the judgment of Scrutton, L.J., in *Mourton v. Poulter*, [1930] 2 K. B. p. 190.

(w) *Addie v. Dumbreck*, [1929] A. C. p. 373. Winfield seems to think (60 L. Q. R. p. 306) that the liability for reckless acts attaches even though the trespasser was not known to be present.

(x) [1920] 3 K. B. 459.

(y) To this extent Hart's remarks in 47 L. Q. R. pp. 100-1, seem to need modification.

persons, for example, if for experimental purposes he puts poison into a well or conceals mines in his field, and there is a probability that trespassers may come upon the land, he is under a duty to warn them of the danger which they run. Shall a man incur the penalty of death or maiming for a mere trespass? (z). But there is no authority for this proposition.

4. *Who are trespassers.*—The word “trespasser” has an ugly sound, but all sorts of comparatively innocent and respectable persons are at law trespassers (a). A trespasser has been defined by Lord Dunedin as one “who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is practically objected to” (b). But it is sometimes difficult to distinguish between a trespasser and a person entering lawfully by the tacit permission of the occupier (c). Thus, the occupier tacitly invites and permits certain classes of persons to enter his garden gate and come to the front door. If his dog bites a person so entering, liability will depend on whether that person falls within the class of persons so tacitly invited; for otherwise he is a mere trespasser to whom no duty is owing. Who, then, are thus entitled to enter, and to complain of injuries received? What shall be said, for example, of hawkers, beggars, tract distributors, canvassers, strangers entering to ask their way? The only acceptable conclusion would seem to be that no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited (d). Moreover, the acquiescence of the occupier in habitual trespasses may be

(z) Cp. *supra*, s. 132 (2).

(a) Cp. *Ilott v. Wilkes* (1820), 3 B. & Ald. p. 312, *per* Bayley, J.

(b) *Addie v. Dumbreck*, [1929] A. C. p. 371.

(c) Yet MacKinnon, L.J., said in *Ellis v. Fulham B. C.*, [1938] 1 K. B. p. 233, “We all know what trespassers are, and that category is clear”!

(d) In *Great Central Ry. v. Bates*, [1921] 3 K. B. 578, a policeman, seeing one of the sliding doors of the defendant's warehouse open, went in at night to see that everything was right, and fell into a sawpit. It was held that the policeman had no right to enter, and that he was therefore a trespasser. See *Davis v. Lisle*, [1936] 2 K. B. 484. He would not, however, seem to have been a trespasser on the principle stated in the text. The alternative ground for the decision is to be preferred that even if he was a licensee the defendants did not know of the likelihood of his entry, and therefore had not knowingly exposed him to a trap. “To say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for that person would appear to me to be a strange use of language”: *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. p. 261, *per* Lord Cave. Cp. *Nabarro v. Frederick Cope, Ltd.*, [1938] 4 A. E. R. 565 (building owner visiting house in course of erection), and cases cited *supra*, s. 129 (2), n. (p). See also *Faton* in 21 Can. Bar Rev. p. 443.

evidence of tacit leave and licence, so as to transform the trespasser into a licensee (e).

It is not always easy to determine whether in a particular case there has been such an acquiescence as to amount to an implied leave and licence (f). Upon this subject Lord Dunedin made some useful observations in *Addie & Sons v. Dumbreck* (g). "Permission must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission", e.g., "a mere putting up of a notice 'No Trespassers Allowed' or 'Strictly Private', followed, when people often come, by no further steps, would, I think, leave it open for a Judge or jury to hold implied permission". But it is not sufficient to make the plaintiff a licensee merely to prove that the occupier has not taken such measures as effectually to stop trespass. "There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees" (h). An unauthorised invitation by a servant of the occupier, acting outside the scope of his authority, to enter upon the premises will not prevent the person who accepts the invitation from being a trespasser (i). Finally a man (or a child) is none the less a trespasser because he does not realise that he is a trespasser. "The question is not whether the particular individual appreciated that he was a trespasser, but whether he was in fact a trespasser" (k).

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(e) *Cooke v. Midland Gt. W. Ry. of Ireland*, [1909] A. C. 229; *Lowery v. Walker*, [1911] A. C. 10, as explained in *Addie v. Dumbreck*, [1929] A. C. 358.

(f) Cp. the difference of opinion in the Court of Appeal in *Adams v. Naylor*, [1944] K. B. 750.

(g) [1929] A. C. 358, at pp. 372-3. Contrast that case with *Excelsior Wire Rope Co. v. Callan*, [1930] A. C. 404.

(h) "The word 'licensee' in the cases that have to do with this subject, though not probably a perfectly accurate word, is certainly intended to include another class, if you so call it, which I may coin a word to represent—namely a 'permittee': *Excelsior Wire Rope Co. v. Callan*, [1930] A. C. p. 411, *per* Lord Dunedin. But the same learned law lord had said in *Addie v. Dumbreck*, [1929] A. C. p. 371: "The line that separates each of these three classes"—invitees, licensees, trespassers—"is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories."

(i) *Hillen v. I.C.I. (Alkali)*, [1936] A. C. 65; *Breslin v. L. & N. E. Ry.*, [1936] S. C. 816.

(k) *Walder v. Hammersmith B. C.*, [1944] 1 A. E. R. p. 492, *per* Humphreys, J. But involuntary trespassers are sometimes said to have a right of action where voluntary trespassers have not (cp. *Deane v. Clayton* (1817), 7 Taunt. pp. 517-9, *per* Dallas, J.) and an occupier may be liable in nuisance to those who accidentally deviate from a highway when he would not be liable to one who did so intentionally: *Barnes v. Ward* (1850), 19 L. J. Q. B. p. 200. *Vide supra*, s. 132 (1) n. (u).

## § 133. Liability of Occupiers to Children

1. We now have to consider how far, if at all, the foregoing principles are subject to modification in their application to young children, and how far, if at all, a special duty of care and protection is due to such children over and above that which is due to adults.

2. *Trespassing children.*—Is an occupier of dangerous premises bound to take precautions against children trespassing thereon and coming to harm? There has been “some conflict both in the United States and in England between a view which may be called the ‘humanitarian’ view, that a child which has no knowledge or discretion to make it capable of contributory negligence must be guarded by the landowner on whose ground it is allowed or tempted to enter, and the ‘hard’ or ‘Draconian’ view, that a child must trespass at its own risk and, if it is so young as not to appreciate what it is doing, it is for its parents, and not for the landowner on whose land it enters without invitation, to protect it” (l). In the much discussed case of *Railroad Company v. Stout* (m) the Supreme Court of the United States held that the landowner owes such a duty where the premises are such as to be an attraction or allurement to young children, in that case a railway turn-table. But even in the United States, for some time the tendency has been to treat that case as imposing an undue and unreasonable burden of care on the occupiers of premises (n). In England it may be said with some confidence that no such rule of liability is recognised. “In cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to the trespasser,” said Lord Dunedin (o). In *Jenkins v. Great Western Ry.* (p) the plaintiff was a child two and a half years old, who trespassed on the defendant company’s railway line by getting through or over the fence which separated it from the highway, and was there run down and injured by a train. On the railway premises and immediately adjoining the fence was a pile of sleepers, and children were in the habit, with the

(l) *Per* Scrutton, L.J., in *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. p. 110.

(m) (1873), 17 Wall. (U. S.) 657.

(n) See Burdick on Torts, §§ 488—489, 4th ed.; Hudson, 36 H. L. R. 826, Harvard Essays, 397; Jeremiah Smith, 11 H. L. R. 349, 434, Harvard Essays, 357.

(o) *Addie v. Dumbreck*, [1929] A. C. p. 376; cp. *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. 101; *Adams v. Naylor*, [1944] K. B. 750; *Walder v. Hammersmith B. C.*, [1944] 1 A. E. R. 490; *McLaughlin v. Antrim Electricity Supply Co.*, [1941] N. I. 23 (child climbing electric pylon). But this does not apply to acts done on the premises with knowledge of the trespasser’s presence, *supra*, s. 132 (3).

(p) [1912] 1 K. B. 525.

knowledge and tacit acquiescence of the company, of entering upon the railway premises and playing on this pile of sleepers. Nevertheless, it was held by the Court of Appeal that the company was under no liability. The tacit permission to enter the premises was confined to the locality of these sleepers, there was no permission to stray upon the railway line itself, and the company was under no legal duty to take precautions to prevent such trespasses. This would seem to be good sense as well as good law. The humanitarian impulse which prompts such decisions as that of *Railroad Company v. Stout* (q) and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company (r).

3. *Distinction between trespassers and licensees.*—Where, however, an occupier habitually and knowingly acquiesces in the trespasses of children, these children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly (s). In *Cooke v. Midland Great Western Railway of Ireland* (t) the plaintiff was a child between four and five years of age who was injured while playing with his companions on a turn-table on the defendant company's railway premises. The turn-table was kept unlocked and was close to a public road. The company's servants knew that children were in the habit of entering on the premises from the road for the purpose of playing with the turn-table, and no precautions were taken by the company, either to exclude the children or to lock the turn-table, so as to prevent it from being an instrument of mischief. It was held by the House of Lords that there was evidence for a jury of actionable negligence on the part of the railway company—not, as in *Railroad Co. v. Stout* (u), on the ground that there is any duty of care towards trespassing children, but on the ground that the habitual acquiescence of the company was sufficient evidence that the plaintiff was not a trespasser, but was on the railway

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(q) (1873), 17 Wall. (U. S.) 657.

(r) This passage was cited with approval by Scrutton, L.J., in *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. p. 110.

(s) This sentence was cited as an accurate statement of the law by MacKinnon, L.J., in *Adams v. Naylor*, [1944] K. B. p. 761.

(t) [1909] A. C. 229.

(u) (1873), 17 Wall. (U. S.) 657.



premises with the leave and license of the company (x). But it seems that the acquiescence must be habitual. "It is permission that must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission" (x).

4. *Measure of duty towards infant licensees.*—What, then, is the measure of the duty thus owed by an occupier towards young children who are licensees? Is the principle that the only duty owed to a licensee is not to lead him without warning into a trap applicable without modification to the case of children? As to this, there are the following observations to be made:—

(a) "The principle . . . must in any given case be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the license, knew or ought to have known the licensee possessed" (y). Many dangers which would be open and obvious to the adult may be concealed and secret traps for the child. Again, "In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation" (z). "You may well have something which to a child constitutes a temptation, whereas to a grown-up person it would not constitute a temptation at all" (a). The defendant will be liable if the child has been lured into a trap. "Allurement . . . is just the bait of the trap, itself a figurative expression" (b). "While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult" (c).

(w) See the explanation of *Cooke's Case* in *Jenkins v. Gt. W. Ry.*, [1918] 1 K. B. 525, *Corporation of Glasgow v. Taylor*, [1922] 1 A. C. 44, *Addie v. Dumbreck*, [1929] A. C. 358, and *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. 101. But see *Ellis v. Fulham B. C.*, [1938] 1 K. B. pp. 226-7, *per Greer, L.J.*

(x) *Addie v. Dumbreck*, [1929] A. C. p. 373, *per Lord Dunedin*; *cp. Lee v. Walkers* (1939), 162 L. T. p. 90; *Adams v. Naylor*, [1944] K. B. 750. See also *Hardy v. Central London Ry.*, [1920] 3 K. B. 459, where, in the absence of any evidence of acquiescence, the defendant was held not liable to a child who suffered injury by playing on a moving stairway.

(y) *Cooke v. Midland G. W. Ry.*, [1909] A. C. at p. 238, *per Lord Atkinson*.

(z) *Latham v. Johnson*, [1913] 1 K. B. p. 415.

(a) *Morley v. Staffordshire C. C.*, [1939] 4 A. E. R. p. 96, *per du Parcq, L.J.* *Cp. Fryer v. Salford Corporation*, [1937] 1 A. E. R. pp. 620-2.

(b) *Addie v. Dumbreck*, [1929] A. C. p. 376, *per Lord Dunedin*.

(c) *Per Holmes, J.*, in *United Zinc and Chemical Co. v. Britt* (1922), 258 U. S. p. 275, quoted by *Scrutton, L.J.*, at [1934] 2 K. B. p. 110.

"A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser" (d). But "for obvious dangers, such as unguarded water, natural or artificial", the landowner will not be liable (e).

(b) To give warning of danger is not sufficient if the licensee is too young to profit by it. It is submitted that in such cases the occupier owes more than a duty of warning; he is bound to take all due care to protect the child from the risks to which he is exposed by reason of the invitation or permission to enter upon the dangerous premises. Whether in any particular case a mere warning is a sufficient performance of the occupier's duty presumably depends on whether the child has attained sufficient discretion to render his act in knowingly exposing himself to the danger of which he has been so warned an act of contributory negligence (f).

(c) The duty of care which is so owing to an infant licensee is, as in all other cases, merely a duty of *reasonable* care. There is no duty to make premises absolutely safe before allowing a child to enter upon them. There are few premises on which an inquisitive and adventurous child has no opportunities of coming to harm. "There is nothing with which a child cannot hurt itself" (g). It is sufficient if the premises are reasonably safe, so that the child is not unreasonably exposed to exceptional dangers over and above those which beset him in his daily adventures (h).

(d) Although, as we have seen (i), it is a good defence that the child was trespassing on the premises where he came to harm, it is not necessarily a defence that the child, though lawfully on those premises, brought the harm upon himself by unlawfully interfering

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(d) *Holdman v. Hamlyn*, [1943] K. B. p. 668, *per du Parcq*, L.J.

(e) *Per Scrutton*, L.J., in *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. p. 112. Cp. *Morley v. Staffordshire C. C.*, [1939] 1 A. E. R. 92.

(f) Cp. *Sycamore v. Ley* (1932), 147 L. T. p. 345, *per Greer*, L.J.

(g) *Morley v. Staffordshire C. C.*, [1939] 1 A. E. R. p. 96, *per Bennett*, J.

(h) See, for example, *Latham v. Johnson*, [1913] 1 K. B. 398, where a child two years and six months old was injured while playing on a heap of stones to which habitual access of children was allowed by the defendant, but it was held, notwithstanding *Cooke's Case*, that there was no cause of action. See also *Liddle v. Yorkshire C. C.*, [1934] 2 K. B. 101. It is also to be observed that a mere general license or invitation, such as may be inferred from habitual acquiescence, is not necessarily to be construed as extending to children so young that they ought not to be at large without proper guardianship. If I tacitly allow boys to gather blackberries in my fields, I am not for that reason responsible for a straying baby who there comes to harm. See *Schofield v. Mayor of Bolton* (1910), 26 T. L. R. 230; *Burchell v. Hickisson* (1880), 50 L. J. C. P. 101.

(i) *Supra*, s. 133 (2).

with dangerous things which he found there (*l*). If the child is so young that such interference does not amount to contributory negligence on his part, the occupier of the premises may be liable for his own negligence in exposing the child to the temptation of so interfering with dangerous and attractive things which he discovers. Thus, in *Corporation of Glasgow v. Taylor* (*l*), a child of seven years of age lawfully entered a botanic garden maintained by the municipality, and was there poisoned by eating the berries of a poisonous shrub of tempting and innocent appearance. Although the child had no right thus to interfere with the plants of the botanic garden, it was held that there might be a cause of action against the corporation for negligence in knowingly exposing young children to such temptations and dangers without warning or other protection. But "the cases in which it has been held that liability arises appear to have one common feature—namely, that the object left unattended and accessible to children, and likely to be an allurement to them, possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued. It may be that the object is dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous" (*m*). So in the case of a stationary and unhorsed van, though there may be allurement, there is nothing in the nature of a trap or concealed peril (*n*).

### § 134. Liability of the Owner of Premises (*n*)

1. *Landlord not liable for dangerous premises*.—Apart from any express contract to that effect, a landlord owes no duty, either towards his tenant or towards any other person who enters on the premises during the tenancy, to take care that the premises are safe either at the commencement of the tenancy or during its continuance (*o*).

Thus, in *Sutton v. Temple* (*p*) the defendant granted to the plaintiff a lease of land for grazing purposes. The plaintiff's cattle

(*l*) As in *Lee v. Walkers* (1939), 162 L. T. 89, where a boy of four and a half years put his arm round a dog which was eating in attempting to get him to play with him and was bitten.

(*i*) [1922] 1 A. C. 44.

(*m*) *Donovan v. Union Cartage Co.*, [1933] 2 K. B. 71, at p. 74, *per* Acton, J.

(*n*) See the challenging article by Glanville Williams in 5 Mod. L. R. 194.

(*o*) *Lane v. Cox*, [1897] 1 Q. B. 415; *Bromley v. Mercer*, [1922] 2 K. B. 126; *Bottomley v. Bannister*, [1933] 1 K. B. 458.

(*p*) (1843), 12 M. & W. 52. See also *Keates v. Cadogan* (1851), 10 C. B. 591.

when put on the land died from the poisonous effect of certain refuse paint accidentally mixed with the manure which, before the commencement of the tenancy, had been spread upon the land. It was held that the tenant was nevertheless liable for the full rent, there being in a lease of land no such implied warranty of fitness as there is in the hiring of a chattel. So in *Davis v. Foots* (q) the defendants let an unfurnished flat to the plaintiff, who was about to get married. Two days before the tenancy began the defendants' son left no tap on a pipe from which he had disconnected a gas-fire with the result that when the gas was turned on at the meter it escaped into the bedroom, the plaintiff's husband died and she herself was very ill. But she had no remedy. Again in *Cheator v. Cater* (r) it was held that a landlord who let part of his land with yew trees growing upon the land retained by him and overhanging the land let, was not responsible to his tenant for the loss of cattle which were poisoned by eating the overhanging branches. The tenant must take the premises as he finds them. It may be otherwise, however, if the trees are safe at the time of demise but subsequently become a source of danger by their further growth (s).

2. *Aliter with furnished house.*—"Fraud apart, there is no law against letting a tumble-down house" (t). The letting of a furnished house or of furnished apartments is, however, an exception to this rule. Such an agreement contains an implied warranty and condition that the premises are at the commencement of the tenancy fit for immediate occupation. If they are not so fit, the tenant may determine the tenancy or sue for damages in respect of any injury suffered (u) (w). But the letting of an unfurnished flat falls within the general rule (x).

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(q) [1940] 1 K. B. 116.

(r) [1918] 1 K. B. 247.

(s) Cp. *Taylor v. Liverpool Corporation*, [1939] 3 A. E. R. p. 387, and see 54 L. Q. R. p. 461. In *Shirrell v. Hackwood Estates*, [1938] 2 K. B. 577, the risk of branches of the dying trees falling had not become substantially greater after the date of the lease, cp. pp. 594, 602.

(t) Erle, C.J., in a judgment written by Willes, J., in *Robbins v. Jones* (1863), 15 C. B. (n.s.) p. 240. Cp. *Hart v. Windsor* (1843), 12 M. & W. 68.

(u) *Smith v. Marrable* (1843), 11 M. & W. 5 (bugs); *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336 (defective drains); *Collins v. Hopkins*, [1923] 2 K. B. 617 (house recently occupied by person suffering from pulmonary tuberculosis). See 5 Mod. L. R. pp. 194—201. This warranty does not extend to defects arising after the commencement of the tenancy: *Sarson v. Roberts*, [1895] 2 Q. B. 395.

(w) Another exception is the implied warranties established by s. 14 of the Housing, Town Planning, etc. Act, 1909, now amended and replaced by s. 2 of

8. *Landlord not liable to strangers.*—The landlord's exemption from liability for dangers existing on premises in the occupation of his tenant extends not merely to injuries suffered by the tenant himself, but to those suffered by other persons entering on the premises during the tenancy (*y*). The lease transfers all obligations towards such persons from the landlord to the tenant.

4. This is so even if the landlord has by contract with the tenant taken upon himself the duty of keeping the premises in repair. Such a contract is *res inter alios acta*, and confers upon strangers no rights against the landlord which they would not have had without it (*z*).

5. *Landlord occupying part of building.*—We have already considered (*a*) the landlord's duties when he lets merely a part of a building and retains the rest in his own occupation, and the tenant or a stranger on the premises is injured as a result of the dangerous condition of that part of the premises which the landlord has retained in his own possession. But it remains to consider the position when as a result of the defective condition of the portion of the premises retained in the landlord's occupation a licensee on some other part of the premises is injured. It seems that in such a case the person injured will have an ordinary action of negligence. Otherwise the startling situation would arise that if a man was in possession of a chimney-stack which he knew was likely to collapse and fall upon an adjoining yard which he had let as a children's playground, if it did collapse, and fall upon a child, he would not be liable (*b*). Even if the tenant's ordinary rights have been diminished by his contract with the landlord, why should that affect a stranger to the contract? (*c*). But difficulty is caused by the judgments of Greer, L.J., and Bennett, J., in *Shirvell v. Hackwood Estates* (*d*), in which case a branch fell from a beech

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the Housing Act, 1936, as to which, see *Ryall v. Kidwell & Son*, [1914] 3 K. B. 135, *Morgan v. Liverpool Corporation*, [1927] 2 K. B. 131, and *Summers v. Salford Corporation*, [1943] A. C. 283.

(*z*) *Cruse v. Mount*, [1933] Ch. 278; *Davis v. Foots*, [1940] 1 K. B. 116.

(*y*) *Lane v. Cox*, [1897] 1 Q. B. 415; *Bromley v. Mercer*, [1922] 2 K. B. 126.

(*a*) *Cavalier v. Pope*, [1906] A. C. 428; *Cameron v. Young*, [1908] A. C. 176; *Malone v. Laskey*, [1907] 2 K. B. 141; *Otto v. Bolton*, [1936] 2 K. B. 46. So also with the statutory implied contract of repair under the Housing Acts, *supra*, n. (*w*). *Ryall v. Kidwell & Son*, [1914] 3 K. B. 135. But see 1 Mod. L. R. p. 60; 5 Mod. L. R. pp. 213-4; 52 L. Q. R. p. 315; Friedmann, *Legal Theory*, pp. 343-4. Contrast the landlord's liability for nuisance, *supra*, s. 57 (*t*).

(*a*) See *supra*, s. 130 (*l*).

(*b*) *Taylor v. Liverpool Corporation*, [1939] 3 A. E. R. p. 333, *per* Stabile, J.

(*c*) See Hamson in 2 Mod. L. R. 215-6; Goodhart in 54 L. Q. R. 461-2.

(*d*) [1938] 2 K. B. 577.

tree, which the occupying owner of the land knew to be in a dying condition, upon the servant of a tenant to whom they had leased the adjoining land. They held that (even if the defendants were negligent) they were not liable. They did not distinguish between a landlord out of possession and one who still retained possession and control, or between a person injured as a result of the condition of the premises demised and one injured, on premises outside the demise. But on this point their judgments have since been held by Stable, J., to be *obiter* (e).

6. *Vendor not liable to purchaser.*—Similarly in the absence of express contract the vendor of real estate is not liable to his purchaser for defects in the property rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence. The purchaser of a freehold is in no better position than a tenant (f). But if he buys a house from builders or the owners of a building estate to be erected or in course of erection, there is an implied warranty by the vendors that the house shall be fit for habitation (g).

7. *Negligent misfeasance.*—Sir John Salmond was of opinion that, though a landlord is not bound to make his premises safe or to ascertain whether they are dangerous, yet if by a positive act of negligent misfeasance he actually creates a source of danger he is responsible for any accident which is the natural and probable result of his negligence (h). As we have seen (i), even a stranger would be so responsible, and the liability of the owner of the premises, he thought, could not be less than that of a stranger. But Greer, L.J., said in *Bottomley v. Bannister* (k) that after *Cavalier v. Pope* (l) and *Lane v. Cox* (m) he could not hold that the decisions relating to the liability of strangers apply to cases between the landlord and persons using the premises by license of the tenant. The result, as Greer, L.J., admitted, is unsatisfactory. In *Bottomley v. Bannister* (k) if the landlord, instead of putting in

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(e) *Taylor v. Liverpool Corporation*, [1939] 3 A. E. R. p. 339. See also *Hanson* in 2 Mod. L. R. 215.

(f) *Bottomley v. Bannister*, [1932] 1 K. B. 458; *Otto v. Bolton*, [1936] 2 K. B. 46.

(g) *Miller v. Cannon Hill Estates*, [1931] 2 K. B. 113; *Perry v. Sharon Development Co.*, [1937] 4 A. E. R. 390.

(h) See Hart in 47 L. Q. R. pp. 97 sqq. Cp. *supra*, s. 132 (3).

(i) *Supra*, s. 127 (3).

(k) [1932] 1 K. B. pp. 477–8.

(l) [1906] A. C. 428.

(m) [1897] 1 Q. B. 415.

the improperly regulated gas boiler himself before he sold the house, had done so afterwards as a contractor to the purchaser he would have been liable on proof of negligence. Greer, L.J., did not distinguish between non-feasance and a positive act of negligent misfeasance. But his judgment was accepted as binding law by Atkinson, J., in *Otto v. Bolton* (n), who held that the principle of *Donoghue v. Stevenson* (o) did not apply to realty. And in *Davis v. Foots* (p), du Parcq., L.J., said that the authorities were against Sir John Salmond's opinion. But in all these cases the danger created by the defendant existed at the time when the tenant entered into possession, and it is submitted that the landlord will be liable for damage caused by any positive act of misfeasance after that date. There is, indeed, much to be said for Sir John Salmond's view that it should make no difference in cases such as *Parry v. Smith*, the facts of which we have already given (q), if the defendant by whose negligence the accident was caused had been the owner of the premises instead of a stranger (r).

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(n) (1936), 52 T. L. R. 448.

(o) [1932] A. C. 562.

(p) [1940] 1 K. B. p. 123.

(q) (1879), 4 C. P. D. 325. *Supra*, s. 127 (8).

(r) Cp. Glanville Williams in 5 Mod. L. R. pp. 204-6. As to the liability of the landlord towards *outsiders*, as opposed to persons entering on the premises see s. 57, above.

## CHAPTER XVI

## BREACH OF STATUTORY DUTIES

## § 135. The Breach of Statutory Duties

1. *Damage caused by breach of statutory duty is prima facie actionable.*—The breach of a duty created by statute, if it results in damage to an individual, is *prima facie* a tort, for which an action for damages will lie at his suit. The question, however, is in every case one as to the intention of the Legislature in creating the duty, and no action for damages will lie if, on the true construction of the statute, the intention is that some other remedy, civil or criminal, shall be the only one available (a). If the statutory duty involves the notion of taking care not to injure, the tort is now spoken of as “statutory negligence” (b).

One of the means of determining what the intention of the statute is is to ascertain whether the duty is owed primarily to the State or community, and only incidentally to the individual, or primarily to the individual or class of individuals, and only incidentally to the State or community (c). If the statute imposes a duty for the protection of particular citizens or a particular class of citizen, it *prima facie* creates at the same time a correlative right vested in those citizens and *prima facie*, therefore, they will have the ordinary civil remedy for the enforcement of that right—namely, an action for damages in respect of any loss occasioned by the violation of it (d). Thus, in *Groves v. Wimborne* (e) the defendant, a manufacturer, was held liable in damages to one of his servants, who had sustained personal injuries through failure of the defendant to perform his statutory duty of fencing dangerous machinery. But this test is not conclusive. “The duty may be

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(a) *Witham Outfall Board v. Boston Corporation* (1926), 136 L. T. 756. See on the whole of this section E. R. Thayer, “Public Wrong and Private Action”, 27 H. L. R. 317, Harvard Essays, 276, and Morris, “Relation of Criminal Statutes to Tort Liability”, 46 H. L. R. 453.

(b) *Idé supra*, s. 119 (2).

(c) *Read v. Croydon Corporation*, [1938] 4 A. E. R. p. 652, *per* Stable, J.

(d) *East Suffolk Catchment Board v. Kent*, [1941] A. C. p. 88, *per* Lord Atkin (in a dissenting speech); *Groves v. Wimborne*, [1898] 2 Q. B. 415, *per* Vaughan Williams, L.J.

(e) [1898] 2 Q. B. 402. Cp. *Lochgelly Iron and Coal Co. v. M'Mullan*, [1934] A. C. 1; *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146; [1910] A. C. 74.



of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot" (f).

2. *But this depends on the intention of the Legislature.*—Notwithstanding the general rule, however, there are many cases in which no action for damages will lie in respect of injuries caused by the breach of a statutory duty. For there is no such remedy unless the Legislature, in creating the duty, intended that it should be enforceable in this way; and there are at least two other alternatives. In the first place, the intention may be that there shall be no civil remedy available for an injured individual at all. The statutory duty is then a duty towards the public at large, and not towards individuals, and the correlative right is vested in the public and not in private persons, even though they may suffer special damage. The duty in such a case is to be enforced by way of a criminal prosecution, or by way of injunction at the suit of the Attorney-General, or in some other manner appropriate to the maintenance of a public right and not by way of a private action for damages (g).

In the second place the Legislature, even while recognising a private right vested in the injured individual, may intend that it shall be maintained solely by some special remedy provided for the particular case, and not by the ordinary method of an action for damages. Thus, a pecuniary penalty recoverable by the injured party, either in criminal proceedings or in a penal action, may be established by the statute as the sole remedy available for the breach of it.

Thus, in the leading case of *Atkinson v. Newcastle & Gateshead Waterworks Co.* (h) it was held by the Court of Appeal, reversing the decision of the Court of Exchequer, that the defendant company was not liable in damages for the destruction of the plaintiff's house by fire, although its destruction was directly due to the failure of the defendants to perform the duty laid upon them under the *Waterworks Clauses Act, 1847* (i), to maintain a certain pressure of

(f) *Phillips v. Britannia Hygienic Laundry*, [1923] 2 K. B. p. 841, per Atkin, L.J.

(g) *Cp. London Armoury Co. v. Ever Ready Co.*, [1941] 1 K. B. p. 754.

(h) (1877), 2 Ex. D. 441. *Cp. Scammell and Nephew v. Hurley*, [1929] 1 K. B. 419.

(i) S. 42. But a breach of the duty under s. 35 of the same Act to provide a supply of pure and wholesome water gives a right of action for damages to a ratepayer injuriously affected: *Read v. Croydon Corporation*, [1938] 4 A. E. R. 631.

water in their water-pipes for the purpose of extinguishing fire. The statute in question provided that any breach of this duty should be an offence punishable by a fine of ten pounds, and the Court came to the conclusion that on the true interpretation of the statute the intention of the Legislature was that this should be the sole remedy available, and that there was no intention of imposing on the waterworks company any such heavy civil liability as the opposite interpretation would have subjected them to.

So in *Saunders v. Holborn District Board of Works* (k) it was held that the plaintiff had no remedy by action against the local sanitary authority for injuries caused through its failure to perform its statutory duty of removing snow from the streets. So also it is settled, as we have already seen (l), that no action will lie against local authorities for injuries caused through a failure to perform their statutory duty of keeping highways in repair. "The general rule is that a local authority is liable for misfeasance but not for non-feasance" (m).

3. *Limits of liability for breach of statutory duty.*—An action for damages will not lie at the suit of an injured person if he is not one of the persons for whose protection and benefit the statute was passed, or if the damage suffered by him is not of the kind intended to be guarded against. In *Gorris v. Scott* (n) the plaintiff sued the defendant, a shipowner, for the loss of sheep which had been swept overboard in consequence of the failure of the defendant to supply certain pens and other structures on the deck of his ship for the accommodation of sheep, as required by Act of Parliament. It was held, however, that the defendant was not liable, because the purpose of the statute in question was to make provision against the spread of contagious disease among animals, and not to prevent such accidents as the plaintiff complained of.

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(k) [1895] 1 Q. B. 64. Other cases in which it has been held that the injured individual has no right of action are: *Vallance v. Falle* (1884), 13 Q. B. D. 109 (refusal of sea captain to give seaman a certificate of discharge); *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 823 (motor on highway with defective axle); *London Armoury Co. v. Ever Ready Co.*, [1941] 1 K. B. 742 (sale of imported goods under trade mark without indication of origin); and *Arbon v. Anderson*, [1943] K. B. 252 (breach of Prison Rules).

(l) *Supra*, s. 70.

(m) *Hesketh v. Birmingham Corporation*, [1924] 1 K. B. p. 271, *per* Scrutton, L.J. *Cp. Robinson v. Workington Corporation*, [1897] 1 Q. B. 619. See Robinson, *Public Authorities*, pp. 133—197. In *Davis v. Bromley Corporation*, [1908] 1 K. B. 170, it was held that no action lies against a municipal corporation for refusing to exercise its statutory power of approving building plans, even though the refusal is malicious.

(n) (1874), L. R. 9 Ex. 125. For a discussion of this case, see E. R. Thayer, 27 H. L. R. pp. 336—338, *Harvard Essays*, pp. 295—297.

4. *Action for damages may be excluded by special statutory remedy.*—Where a statute simply creates a new duty without expressly providing any remedy for the breach of it, the appropriate remedies are *prima facie* an indictment as for a misdemeanour in respect of any injury to the public, and an action for damages in respect of any special damage suffered by an individual. But where a special remedy is expressly provided, *prima facie* this was intended to be the only one and to exclude by implication any resort to the common law (o). But this is by no means conclusive (p). The weight to be attributed to this consideration will depend largely on whether the statutory remedy does or does not involve compensation to individual persons injured. Thus a pecuniary penalty payable wholly to the Crown has comparatively little significance in excluding an action for damages. So in *Monk v. Warbey* (q) the defendant lent his car to one Knowles who, owing to the negligence of his driver, injured the plaintiff. The defendant had insured himself against third-party risks, but had not provided for parting with control of the car to uninsured friends, and therefore had exposed himself to a penalty under section 35 of the Road Traffic Act, 1930. It was held that he was liable in damages to the plaintiff for the breach of his statutory duty. Otherwise the express object of the Act would have been defeated. But if the penalty goes or may go in whole or in part to the injured persons, much greater weight may rightly be attached to its existence. Again where a civil remedy is provided in certain cases by the Act itself (r) or other legislation (s) or by the common law (t), *prima facie* no action will lie in other cases than those for which provision is made. In no case, however, is this consideration conclusive.

Indeed, it is impossible to lay down a more definite principle

(o) *Phillips v. Britannia Hygienic Laundry*, [1923] 2 K. B. p. 841, *per* Atkin, L.J.; *Monk v. Warbey*, [1935] 1 K. B. p. 84, *per* Maugham, L.J.

(p) *Groves v. Wimborne*, [1898] 2 Q. B. p. 416, *per* Vaughan Williams, L.J.; Atkin, L.J., *loc. cit.*

(q) [1935] 1 K. B. 75. *Cp. Richards v. Port of Manchester Insurance Co.* (1934), 152 L. T. 413; *McLeod v. Buchanan*, [1940] 2 A. E. R. 179. Contrast *Daniels v. Vaux*, [1938] 2 K. B. 203 (where the breach of the statutory duty to insure was not the cause of the loss); *Goodbarne v. Buck*, [1940] 1 K. B. 771. See also Macdonald, "The Negligence Action and the Legislature", in 13 Can. Bar Rev. pp. 543-5.

(r) *Cp. Chadwick v. Pioneer Private Telephone Co.*, [1941] 1 A. E. R. 522.

(s) *Cp. Square v. Model Farm Dairies*, [1939] 2 K. B. 365.

(t) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. p. 842, *per* Atkin, L.J.; *supra*, s. 135 (2) n. (k). So understood this case can be reconciled with *Monk v. Warbey*, in which it was cited with approval. It is difficult to discover any other principle by which to distinguish the two cases.

than this. The general rule is that "where an Act creates an obligation and enforces the performance in a specified manner . . . performance cannot be enforced in any other manner" (u). But in the words of Lord Macnaghten (w) "whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience". The result is that the law depends upon the interpretation which the Courts may put upon any particular statute, and the consequence is an undesirable uncertainty (x).

5. *Not exclusive of common law remedies.*—Even where the breach of the statute does not in itself give a right of action to an individual damnified thereby the right of action for breach of any common law duty to conduct oneself with reasonable care so as not to injure those persons likely to be affected by want of care is not excluded (y). The statutory duty does not extinguish the common law duty unless there is an express provision or necessary implication to that effect (z).

### § 136. Absolute Statutory Duties

1. *Proof of negligence in the case of statutory duties.*—When a duty is created by statute, the breach of which is an actionable tort, it is a question of construction whether the liability is absolute, or depends on wrongful intent or negligence on the part of the defendant. In other words, when a statute provides that a certain thing must be done, it is a question of interpretation whether this means that the thing is to be done in all events, or merely that the person upon whom the duty is imposed is to use due care and diligence in the endeavour to perform it, and that if he fails to perform it through no fault of his, he shall be free from liability (a) (b).

In *Hammond v. Vestry of St. Pancras* (c) the defendants were

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(u) *Per* Lord Tenterden in *Doe v. Brydges* (1831), 1 B. & A. p. 859.

(w) *Pasmore v. Oswaldtwistle U. D. C.*, [1896] A. C. p. 397.

(x) Cp. 177 L. T. Jo. 219.

(y) *East Suffolk Catchment Board v. Kent*, [1941] A. C. p. 89, *per* Lord Atkin.

(z) *Glossop v. Heston Local Board* (1879), 12 Ch. D. pp. 110-1, *per* James, L.J.; *Read v. Croydon Corporation*, [1938] 4 A. E. R. p. 654.

(a) This paragraph was cited with approval by Luxmoore, L.J., in *Greenwood v. Central Service Co.*, [1940] 2 K. B. p. 461.

(b) Even in such cases it seems that the onus may be on the defendant to disprove negligence: *Greenwood v. Central Service Co.*, [1940] 2 K. B. p. 461.

(c) (1874) L. R. 9 C. P. 816. Cp. *Blundy, Clark & Co. v. L. & N. E. Ry.*, [1931] 2 K. B. 334; *Read v. Croydon Corporation*, [1938] 4 A. E. R. p. 651.

held not liable in the absence of proof of negligence for failure to perform their statutory duty of keeping the sewers in order. "It would seem to me", says Brett, L.J. (d), "to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. . . . Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed." On the other hand, even though an absolute liability is in a sense abhorrent, if the language of the statute is clear it will be construed as imposing such a liability (e). So, in *Groves v. Wimborne* (f) it was held that liability for a breach of the statutory duty to fence dangerous machinery was absolute, and independent of any proof of negligence on the part of the defendant or his servants. In such a case "there is no need to prove negligence as an issue for the jury, because the statute itself is conclusive evidence of negligence, unless it contains in itself some qualification" (g). Even where the liability is said to be absolute, the Courts do not always attach precisely the same effect to the statute. It has been said (h) that under the Factory and Workshop Act, 1901 (i), if a dangerous machine cannot be securely fenced whilst remaining commercially practicable or mechanically useful it cannot lawfully be used at all, though the House of Lords has reserved opinion on the correctness of this view (k). On the other hand, it has been held in the Court of Appeal that regulations dealing with operations involving testing and research with highly dangerous apparatus cannot be construed so as to make testing and research impossible and that the precautions required can only be

(d) (1874), L. R. 9 C. P. p. 322.

(e) *Makin, Ltd. v. L. & N. E. Ry.*, [1933] K. B. p. 471, per Lord Greene, M.R.

(f) [1898] 2 Q. B. 402. See also *David v. Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146; [1910] A. C. 71.

(g) *Lochgelly Iron and Coal Co. v. M'Mullan*, [1934] A. C. p. 27, per Lord Wright.

(h) *Davies v. Thomas Owen*, [1919] 2 K. B. p. 41, per Salter, J. Cp. *Fowler v. Yorkshire Electric Co.* (1939), 160 L. T. p. 209.

(i) S. 10. Now see Factories Act, 1937, s. 14.

(k) *Lewis v. Dwyer*, [1940] A. C. pp. 931-2. Lord Atkin apparently thinks the view correct. So also the Court of Appeal in *Miller v. Boothman*, [1944] 1 K. B. 337 (except where there are special regulations), and a Divisional Court held that this was the case in criminal proceedings: *Dennistoun v. Greenhill, Ltd.*, [1914] 2 A. E. R. 434. As to the effect of special regulations upon the duty imposed by a statute, see *Miller v. Bookman, supra*, and *Nicholls v. Austin (Leyton), Ltd.*, [1945] 1 K. B. 50.

those which comply with the highest standard of safety which can reasonably be provided (l). A statute may impose a duty so absolute in its obligation that even an Act of God will provide no defence. Such an obligation is usually imposed upon the undertakers of waterworks in the case of the bursting of the banks of a reservoir (m).

It seems, in spite of some *dicta* to the contrary, that a defence which may be good as against criminal proceedings under an Act does not necessarily relieve the defendant of civil liability (n).

2. *Defences*.—Although an action for damages arising from a breach of an absolute statutory duty is known as an action of statutory negligence, neither the defence of *volenti non fit injuria* nor common employment affords a good defence (o). Possibly the ground for this rule is that it is contrary to public policy that where there is a statutory obligation on the employer the workman should contract out of it (p). On the other hand, in *Caswell v. Powell Duffryn Collieries, Ltd.* (q) the House of Lords unanimously, though *obiter*, held that the contributory negligence of the plaintiff provides a good defence, for then the essential cause of the accident is the negligence of the plaintiff himself.

3. *Contributory negligence*.—But in the case of breach of provisions designed for the protection of workmen, for example, under the Factories Act, 1937 (r), and the Coal Mines Act, 1911 (s), too high a standard of care must not be demanded from a workman (t). The standard to be applied is that of the ordinary prudent workman, and the Courts must “take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery

(l) *Proctor v. Johnson*, [1948] K. B. p. 556.

(m) *Makin, Ltd. v. L. & N. E. Ry.*, [1948] K. B. 467, 477.

(n) *Riddell v. Reid*, [1943] A. C. 1, 25, 31-2. Cp. *Yelland v. Powell Duffryn Collieries*, [1941] 1 K. B. pp. 167-8, *per du Parcq*, L.J.

(o) *Wheeler v. New Merton Board Mills*, [1933] 2 K. B. 669. See Winfield, pp. 153-4.

(p) *S. C.* p. 691. It seems to be a general principle that the maxim *volenti non fit injuria* does not apply where there has been a disregard of an obligation imposed by statute: *Bowmaker, Ltd. v. Tabor*, [1941] 2 K. B. pp. 8-9, *per* Goddard, L.J.

(q) [1940] A. C. 152. Cp. *Lewis v. Denye*, [1940] A. C. pp. 929-30, *per* Viscount Simon, L.C. For this purpose there is not any difference between the duty imposed by one statute and another: *Sparks v. Edward Ash*, [1943] K. B. pp. 233-40, *per* Goddard, L.J.

(r) *S.* 14.

(s) *S.* 55.

(t) *Lewis v. Denye*, [1940] A. C. p. 931, *per* Viscount Simon, L.C.

that a plaintiff ought to be held guilty of contributory negligence" (u). The employer is not even relieved of liability merely because the workman at the time of the accident was guilty of a breach of his duty under the statute unless that breach of duty caused or contributed to his injury (w). But the workman's breach may be such as to provide evidence of his negligence (x). Finally, if it has been established that the injury would not have been caused if the employer's statutory duty had been performed, the onus is on the defendant to prove that the plaintiff's contributory negligence was a substantial or material co-operating cause (y). It is not for the plaintiff to show exactly how the accident happened (z). The Court should be very chary of finding contributory negligence where the contributory negligence was the very thing which the statutory duty of the employer was designed to prevent (a). The Courts in evolving these principles as to the application of the doctrine of contributory negligence to the breach of statutory duties, notwithstanding some anxiety which has been expressed to the contrary, seem to have afforded ample protection to the workman.

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(u) *Flower v. Ebbw Vale Steel Co.*, [1934] 2 K. B. p. 140, per Lawrence, J.; approved in *Caswell v. Powell Duffryn Collieries*, [1940] A. C. pp. 166, 174-7, by Lords Atkin and Wright.

(w) *Lewis v. Denye*, [1940] A. C. p. 929, per Viscount Simon, L.C.; *Hanlon v. Port of Liverpool Stevedoring Co.*, [1937] 4 A. E. R. p. 42. Cp. *supra*, s. 124 (7). *A fortiori* where the employee in breach is acting under the employer's orders: *Murray v. Schwachman, Ltd.*, [1938] 1 K. B. 130. In criminal proceedings the employee's negligence is irrelevant: *Wraith v. Flexible Metal Co.*, [1943] K. B. 24. But see 39 H. L. R. p. 1068, for American cases in which the plaintiff's breach of a statutory duty has been held to bar his right of action in tort. Cp. 18 H. L. R. 505, Harvard Essays, 558.

(x) *Lewis v. Denye*, [1940] A. C. p. 929; *S. C.*, [1939] 1 K. B. p. 555.

(y) *Caswell's Case*, [1940] A. C. p. 172, per Lord Wright; *Stimpson v. Standard Telephones*, [1940] 1 K. B. pp. 350-1, per Greene, M.R.

(z) *Dawson v. Murex, Ltd.*, [1942] 1 A. E. R. 483. Contrast *Youngman v. Pirelli Cable*, [1940] 1 K. B. p. 26, per Clauson, L.J.

(a) *Hutchinson v. L. & N. E. Ry.*, [1942] 1 K. B. p. 488, per Goddard, L.J. Cp. Lord Greene, M.R., at p. 486.

## CHAPTER XVII

THE RULE IN RYLANDS v. FLETCHER AND  
LIABILITY FOR FIRE

## § 137. The Rule in Rylands v. Fletcher

1. *Liability for escape of dangerous things is strict.*—The rule known as that in *Rylands v. Fletcher* (a) is one of the most important cases of absolute or strict (aa) liability recognised by our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus :—

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.

2. *The rule in Rylands v. Fletcher.*—In *Rylands v. Fletcher* (a) the defendants constructed a reservoir upon their land, and upon the site chosen for this purpose there was a disused and filled-up shaft of an old coal-mine, the passages of which communicated with the adjoining mine of the plaintiff. Through the negligence of the contractors or engineers by whom the work was done (and who were not the servants of the defendants) this fact was not discovered, and the danger caused by it was not guarded against. When the reservoir was filled, the water escaped down the shaft and thence into the plaintiff's mine, which it flooded. It was held by the Exchequer Chamber and by the House of Lords that the defendants were liable, although guilty of no negligence either by themselves or by their servants. Blackburn, J., in delivering the judgment of the Exchequer Chamber said (b) : "The question of law therefore arises, What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land

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(a) (1866), L. R. 1 Ex. 265; (1868), L. R. 3 H. L. 330.

(aa) Winfield suggested (42 L. Q. R. p. 51) that "strict" was a better term than absolute in view of the admitted exceptions to the rule, and this, according to Scott, L.J., is now recognised as the appropriate term in English law: *Read v. Lyons & Co.* (1944), 61 T. L. R. p. 149.

(b) *Fletcher v. Rylands* (1866), L. R. 1 Ex. p. 279.



something which, though harmless while it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours : but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. . . . We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape."

3. *Distinction between natural and non-natural use of land.*—Blackburn, J.'s statement of the law was expressly approved in the House of Lords (c), but Lord Cairns, perhaps unconsciously (d), laid down (e) a new principle (f), distinguishing the natural from the non-natural user of land, and holding that in the latter case only was the liability absolute. It has not always been recognised that this is to substitute a different principle from that adopted by Blackburn, J. It converts a rigid into a flexible rule, and enables the Court by determining what is or is not a natural user of land to give effect to its own view of social and economic needs (g). "What is natural to one period is unnatural to another" (h). For this very reason no definition of "natural user" is possible or even desirable (i). The validity of the distinction has indeed been denied. So Sir John Salmond said (j): "Such a distinction has

(c) (1868), L. R. 3 H. L. p. 340.

(d) Lord Cairns does not seem to have kept clearly distinct the difference between things naturally on the land, and things brought upon the land in the course of natural user. See 3 Camb. L. J. p. 391, *vide infra*, s. 138 (6).

(e) (1868), L. R. 3 H. L. p. 338.

(f) Manisty, Q.C., however, based his argument upon this distinction both in the Exchequer and in the House of Lords: (1865), 3 H. & C. 774; (1868), L. R. 3 H. L. p. 336. And Bramwell, B., had already taken the same distinction in *Bamford v. Turnley* (1860), 3 B. & S. p. 83.

(g) Bohlen, *Studies*, pp. 349—351.

(h) Friedmann in 1 Mod. L. R. p. 51, *q.v.* But to manufacture explosive shells even in war-time is a non-natural user: *Read v. Lyons & Co.* (1944), 170 L. T. 418 (Cassels, J.), and 61 T. L. R. 148 (in Court of Appeal). But possibly if carried on in pursuance of a public duty it does not involve liability under the rule in *Rylands v. Fletcher*: *S. C.*, at pp. 150-1, 153, *per* Scott, L.J.

(i) Cassels, J., for the purposes of the case before him called it "a special use bringing with it increased danger to those who are on or in the neighbourhood of the premises." *S. C.*, 170 L. T. p. 420.

(j) 6th ed., s. 61 (7).

nothing in principle to recommend it. What is the natural use of land? Is it natural to build a house on it (*k*), or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alteration may go before the use of the land becomes non-natural or extraordinary, so as to bring the rule in *Rylands v. Fletcher* into operation. Moreover, if there is one kind of use more natural than another it is the keeping of cattle; yet cattle-trespass is a typical instance of the application of this rule of strict responsibility, and is indeed the historical source of the general principle." "Such unreal and impracticable distinctions are not creditable to the development of English law" (*l*). But there is an abundance of authority in support of this qualification upon the generality of the rule (*m*). Thus it is the natural user of land to bring water into a cistern in a house (*n*). So the laying of gas pipes by a landlord for the supply of gas to dwelling-houses owned by him is a natural and not a non-natural use of his property (*o*), and so is wiring for domestic use or for purposes of trade (*p*), though electricity or gas when carried in bulk attract the principle of *Rylands v. Fletcher* (*q*). "Extraordinary", "exceptional", "abnormal", are words that are sometimes used in substitution for "non-natural", and they suggest the true principle underlying the doctrine (*r*). Historically the doctrine is derived from the law relating to the working of mines (*s*). It now has a general application: in order to fall under the rule in *Rylands v. Fletcher* the use to which the defendant's land is put must be "some special

(*k*) The answer is that it depends on the circumstances; Winfield, p. 529.

(*l*) Salmond, 6th ed., s. 61 (*7*), n. (*g*). See also Jeremiah Smith in 30 H. L. R. p. 411, Harvard Essays p. 216; Charlesworth, p. 148; Iyer, pp. 270-4. In *Read v. Lyons & Co.*, *supra*, at p. 151, Scott, L.J., said: "Where to draw the dividing line between 'natural' and 'non-natural' may usually be easy in wild moorland or even land under agriculture, but to draw it in an urban area, and *a fortiori* in an industrial area, would seem to me in its nature a difficult task of legal definition."

(*m*) See the cases cited in the seventh edition, s. 88 (*3*), notes (*g*) and (*i*), and in the ninth edition, s. 141 (*3*), n. (*l*), and in 3 Camb. L. J. 390-397, and add *Howard v. Furness Houlder*, [1936] 2 A. E. R. p. 786 (generating steam on a steamship probably not unnatural); *Tilley v. Stevenson*, [1939] 4 A. E. R. 207; *Hale v. Jennings Bros.*, [1938] 1 A. E. R. p. 584 (chair-o-plane unnatural).

(*n*) *Rickards v. Lothian*, [1913] A. C. 263. *Western Engraving Co. v. Film Laboratories*, [1936] 1 A. E. R. 106, was explained in *Peters v. Prince of Wales Theatre*, [1943] K. B. 73. See 59 L. Q. R. p. 9. See also *Marchant Mfg. Co. v. Ford* (1936), 154 L. T. 430.

(*o*) *Miller v. Addie & Son's Collieries*, [1934] S. C. 150.

(*p*) *Collingwood v. Home and Colonial Stores* (1936), 155 L. T. 550.

(*q*) *Ibid.*; *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. 108.

(*r*) See, on the whole of this topic, *Stallybrass* in 3 Camb. L. J. pp. 389 sqq.

(*s*) 3 Camb. L. J. p. 393. *Vide infra*, s. 138 (*5*).

use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community" (t). The greater elasticity which the recognition of this principle gives to the rule as laid down by Blackburn, J., is desirable: it is by its flexibility that the common law has life (u). But we must recognise that cattle-trespass is an exception; a rigid rule of the common law, deeply rooted in its history, it has withstood the rationalisation of the law by Lord Cairns' principle. It is logically an independent principle outside the general rule (v).

4. *Historical origin of the rule.*—The historical background of the rule in *Rylands v. Fletcher* was four-fold. In early law a land-owner had four remedies against his neighbour whose use of his land injuriously affected him in the exclusive enjoyment of his property; the action of trespass where the injury was direct, the assize of nuisance in which the primary object of the proceedings was abatement, the action upon the case "upon the custom of the realm" for harm done by the spread of fire, and the action of cattle-trespass (w). To none of these actions was it a good defence to prove that the defendant was without fault. When the action upon the case for nuisance took the place of the assize of nuisance the liability was still absolute (x). In 1708 Lord Holt in *Tenant v. Goldwin* (y) treated the flow of filth from a privy as analogous to the escape of cattle from land. (Blackburn, J., did not intend to make new law in *Rylands v. Fletcher*; he made a generalisation which covered the cases of absolute liability which had survived the general "moralisation" of the law in the eighteenth and nineteenth centuries (z). In the language of Wigmore (a) these cases of liability without fault "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this Judge co-

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(t) *Richards v. Lothian*, [1913] A. C. p. 280, per Lord Moulton; *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 888, per Lord Wright; *Read v. Lyons & Co.*, *supra*, at pp. 153-4, per Scott, L.J.

(u) *Stallybrass* in 3 Camb. L. J. pp. 389 *sqq.*

(v) *Holdsworth*, H. E. L. viii, pp. 470-1.

(w) *Infra*, s. 147 (1).

(x) *Supra*, s. 55 (4).

(y) 2 Ld. Raym. 1092.

(z) *Supra*, s. 4 (6).

(a) 7 H. L. R. p. 454, *Harvard Studies*, p. 77, A. A. L. H. iii, p. 518.

ordinated them all in their true category" (b). But in fact new law was made, for it was a new doctrine that the occupier was liable for the defaults of an independent contractor and (as later decisions showed) of anyone except a stranger (c).

5. *Things likely to do mischief if they escape*.—To what "things" does the rule in *Rylands v. Fletcher* apply? Blackburn, J.'s language is very wide—"anything likely to do mischief if it escapes". He does not restrict the rule to things likely to escape; or to cases in which the defendant is making use of his land in a way which is fraught with exceptional peril to others (d). Most things are likely to do mischief if they escape, and it seems that notwithstanding the breadth of Blackburn, J.'s language, we must treat the rule as subject to both limitations (e). Subsequent decisions have equated the expression with "dangerous things" (f). But, as *du Parcq, L.J.*, has pointed out (ff), Blackburn, J., in *Rylands v. Fletcher* was not purporting in his judgment to convey a representative list of extra-hazardous activities—it is not extra-hazardous to keep cows or maintain a privy—but was dealing with things which are harmless to others so long as they are confined to a man's own property. He was not considering the rights of those who are injured by dangerous chattels on premises which they have entered.

We shall see (g) that it is difficult to find a test by which to distinguish those things which are dangerous in themselves. It is not much easier to discover what are the things which are likely to do mischief if they escape. Nor does an examination of all the

(b) On this topic see Bohlen, *Studies*, 344; Wigmore, *A. A. L. H.* iii, 474, 7 *H. L. R.* 315, 383, 441, *Harvard Essays* 18; Holdsworth, viii, pp. 468–472. Holdsworth adds to the sources of the rule the absolute liability for harm done by animals *feræ naturæ*, whereas Bohlen finds the common quality originally in the protection of the plaintiff's enjoyment of his land. Charlesworth's book on *Liability for Dangerous Things* is an attempt to rationalise the whole law on that subject upon the basis of the rule in *Rylands v. Fletcher*.

(c) Winfield in 4 *Camb. L. J.* p. 193, who criticises the historical explanation given in the text. See also his *Torts*, p. 524.

(d) See Jeremiah Smith in 30 *H. L. R.* pp. 410–411, *Harvard Essays*, pp. 215–216.

(e) Bohlen, *Studies*, pp. 403–407. Cp. *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 *K. B.* 772, *per Lord Sumner*; *Northern Counties Fire Insce. Co. v. Whipp* (1884), 26 *Ch. D.* p. 498, *per Fry, L.J.*; *Mansel v. Webb* (1918), 88 *L. J. K. B.* 323, *per Duke, L.J.*; *Manton v. Brooklebank*, [1923] 2 *K. B.* 212, *per Atkin, L.J.*; *Noble v. Harrison*, [1926] 2 *K. B.* pp. 342–343, *per Wright, J.*

(f) See 3 *Camb. L. J.* pp. 378 *sqq.*, and *Northwestern Utilities, Ltd. v. London Guarantee Co.*, [1936] *A. C.* p. 118; *Hale v. Jennings Bros.*, [1938] 1 *A. E. R.* 579.

(ff) *Read v. Lyons & Co.* (1944), 61 *T. L. R.* p. 156.

(g) *Infra*, s. 149 (5).

cases in which the rule in *Rylands v. Fletcher* has been held to apply carry us very far. Chemicals, fire and electricity are always treated as falling under the rule; water, trees, stacks of chimneys, motor cars and unloaded guns sometimes do, and sometimes do not come under it (*h*). In *Firth v. Bowling Iron Co.* (*i*) decayed wire rope was held to impose liability under the rule, though it certainly could not be considered likely to escape, and in *Hoare v. McAlpine* (*k*) vibrations were held to come under the rule, though it is difficult to regard them as things. 'Kay, J., boldly stated (*l*) that the principle applied to everything: "Anyone who collects upon his own land water, or anything else, which would not in the natural condition of the land be collected there, ought to keep it in at his peril." Bennett, J., in *Att.-Gen. v. Corke* (*m*) struck out a new path and held that "the principle which underlies the decision in *Rylands v. Fletcher*" afforded a basis upon which to grant an injunction against the owner of a disused brickfield who licensed caravan dwellers to dwell upon it who committed nuisances upon adjoining land. Caravan dwellers are certainly likely to escape and to do mischief if they do, but they are not things, and it would seem that the mischief which they do is to be imputed to a *novus actus interveniens*. Even if we regard this latest extension of the law as unjustifiable it is submitted that we are driven to the conclusion that the principle applies to anything which anyone brings, collects and keeps upon his land, otherwise than in the course of the ordinary user of the land, which in the circumstances of the case is likely to cause an undue risk of mischief to others (*n*). The Legislature has by statute applied the principle to aircraft (*o*), and a proposal has been made to extend it to motor vehicles which injure pedestrians (*p*).

¶ In some cases (*q*) a confusion has crept in by which the distinction between dangerous and non-dangerous things has been confounded with the distinction between non-natural and natural user

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(*h*) See a full examination of the authorities by Stallybrass, 3 Camb. L. J. pp. 332-5.

(*i*) (1878), 3 C. P. D. 254.

(*k*) [1923] 1 Ch. 167. See Pollock in 39 L. Q. R. 145.

(*l*) *Snow v. Whitehead* (1884), 27 Ch. D. p. 591.

(*m*) [1933] Ch. 89. See Holdsworth in 49 L. Q. R. 158.

(*n*) See 3 Camb. L. J. pp. 387-9. See also Charlesworth, pp. 5-14.

(*o*) *Supra*, s. 47 (9).

(*p*) See 176 L. T. Jo. 75, *supra*, s. 4 (6), n. (s).

(*q*) E.g., *Barker v. Herbert*, [1911] 2 K. B. p. 642, *per* Fletcher Moulton, L.J.; *Latham v. Johnson*, [1913] 1 K. B. p. 406, *per* Farwell, L.J.; *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. p. 8, *per* Lawrence, L.J. These dicta are discussed in 3 Camb. L. J. p. 395.

of land. It is submitted that the two questions, though related, are distinct. Water, filth, and many other so-called *Rylands v. Fletcher* objects are perfectly usual objects. In order that liability under the rule may be imposed it is necessary both that the user of the land should be extraordinary and that the object should in the circumstances of the particular case be dangerous.

6. *Rule not limited to use of defendant's own land.*—As originally laid down the rule was limited to cases in which the defendant had made use of his own land in such a way as to cause damage to others. The basis of the action was the disturbance of the plaintiff's possession. In subsequent cases the rule has been given a much wider ambit. )

Moreover, the rule of absolute liability established by *Rylands v. Fletcher* applies to the escape of things from the highway, no less than to their escape from the defendant's own land. He who brings any dangerous thing upon the highway, or interferes with any dangerous thing already there, with the result that it does damage on adjoining property, is absolutely liable without proof of negligence, unless he can prove that the accident was due to the act of a stranger or to the act of God. Thus, in *Midwood v. Mayor of Manchester* (r), the corporation of Manchester was held liable, apart from any proof of negligence, for an explosion and fire caused by the escape into the plaintiff's house from the adjoining roadway of an inflammable gas created by the fusing of a defective electric cable there laid down by the defendant, and the resulting volatilisation of the bitumen in which the cable was enclosed.

7. *Liability not limited to adjoining occupiers.*—In *Charing Cross Electricity Supply Company v. Hydraulic Power Company* (s), the Court of Appeal, professing to follow *Midwood v. Mayor of Manchester* (t), went considerably further by holding that the rule in *Rylands v. Fletcher* was applicable as between two companies using a highway as licensees under statutory authority for the transmission of water and electricity respectively; and the water company was held liable for damage done to the electric cables of the other company by the escape of water from a broken main (u).

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(r) [1905] 2 K. B. 597.

(s) [1914] 3 K. B. 772.

(t) [1905] 2 K. B. 597.

(u) Lord Sumner said (at p. 779): "I am satisfied that *Rylands v. Fletcher* is not limited to the case of adjacent freeholders. I shall not attempt to show

The right to sue is, therefore, not limited to an adjoining occupier. A guest or invitee upon adjoining property has a good cause of action, as in *Shiffman v. Order of St. John* (v), where a flag-pole erected near a casualty hut in Hyde Park fell upon the plaintiff who was lying on the ground near-by with his head in his wife's lap. And probably an action is given to "any one who is injured by the dangerous thing, without any restriction whatsoever" (w). But according to the better view there must be an escape to render the defendant liable (x). In *Read v. Lyons & Co.* (y), where the plaintiff was injured by an explosion on the premises where she was working, the Court of Appeal denied the plaintiff any remedy. The doctrine of *Rylands v. Fletcher*, as enunciated by Blackburn, J., said MacKinnon, L.J., "was limited to the operation of the source of danger brought by a plaintiff on his land, if it caused damage outside the limits of his land to the person or property of a neighbour".

Further, in *St. Anne's Well Brewery Co. v. Roberts* (a) it was held that the doctrine does not affect the exemption from liability of an owner who is out of possession at the time that the injury takes place. Scrutton, L.J., treated it as only applicable to occupiers, but this was an unnecessarily wide generalisation for the purposes of the case and it is submitted that any one who introduces the mischievous thing and has control of it at the time of the escape might be made liable under the rule (b), and that liability is dependent upon control (c).

how far it extends. It extends as far as this case, and that is enough for the present purpose." Cp. *Shiffman v. Order of St. John*, [1936] 1 A. E. R. 557 (flag-pole erected in Hyde Park), and in particular *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 118.

(v) [1936] 1 A. E. R. 557.

(w) Charlesworth, p. 68. Cp. Iyer, p. 276. *Contra*, apparently, Scott, L.J., in *Read v. Lyons & Co.* (1944), 61 T. L. R. p. 153. But see Pollock, 391.

(x) *Howard v. Furness Houlder*, [1936] 2 A. E. R. p. 786; *Collingwood v. Home and Colonial Stores* (1936), 155 L. T. p. 553, explaining *Musgrove v. Pandelis*, [1919] 2 K. B. 43.

(y) (1944), 61 T. L. R. 143, 154, reversing Cassels, J., in the Court below: 170 L. T. 418. See Stallybrass in 60 L. Q. R. 207. Cassels, J., relied upon the cases dealing with liability for dangerous animals.

(a) (1928), 140 L. T. 1. See Stallybrass in 45 L. Q. R. 118. Cp. *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. 465.

(b) Cp. Lord Sumner in *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. p. 479: "They cannot escape any liability which otherwise attaches to them on storing it [dinitrophenol] there merely because they have no tenancy or independent occupation of the land but use it thus by permission of the tenants or occupiers".

(c) Cp. *Westhoughton Coal Co. v. Wigan Coal Corporation*, [1939] Ch. 800.

## § 138. Things Naturally on Land

1. *No liability for things naturally on defendant's land.* The rule in *Rylands v. Fletcher* applies to things which are brought and kept upon the defendant's land, and is inapplicable to things which are naturally there, howsoever dangerous they may be—e.g., noxious weeds, vermin, or water. So far from being absolutely liable for the escape of these things, the occupier of land is not even under any duty of care to prevent their escape (d). From such dangers every man must protect himself. Thus, in *Pontardawe R. D. C. v. Moore-Gwynn* (e) it was held that a landowner was not liable in respect of rocks on his land which, owing to weathering, were breaking away and causing damage to persons in a valley beneath; since they were part of the natural formation, and their presence was not due to quarrying or any other operation. So, in *Giles v. Walker* (f), it was held that the occupier of land is not bound to prevent the growth of thistles on it and the consequent spread of thistles down to the lands of his neighbours. On the same principle, an occupier is not bound to prevent damage to his neighbour by the natural escape of flood-water from higher to lower levels (g).

2. *Liability if artificially accumulated.*—A person is liable, however, even for the escape of things naturally on his land, if he has artificially accumulated them there so that their escape does more mischief than it would otherwise have done. If he collects in a reservoir the rainwater that falls upon his land, he is no less responsible for its escape than if he had brought the water in pipes from elsewhere (h).

The question then arises: what is the position if a man by altering the natural state of his land unintentionally causes noxious things to accumulate? To this it is impossible to give a definite answer. In fact this was the position in *Giles v. Walker* (i), for there the defendant had caused the growth of the thistles by

(d) See the critical discussion of this rule by Noel in 56 H. L. R. 772 *seq.*

(e) [1929] 1 Ch. 656. So also American Restatement, s. 363. But it is submitted that the persons threatened by the rocks would have had a right to abate the nuisance themselves. Cp. *Job Edwards v. Birmingham Navigations*, [1924] 1 K. B. p. 355, *per* Scrutton, L.J.

(f) (1890), 24 Q. B. D. 656.

(g) *Nield v. London & N. W. Ry.* (1874), L. R. 10 Ex. 4; *Rouse v. Gravel-works, Ltd.*, [1940] 1 K. B. 489. Cp. in the case of noxious animals, *infra*, s. 148 (5).

(h) Cp. in the case of noxious animals, *infra*, s. 148 (5).

(i) (1890), 24 Q. B. D. 656.



bringing into cultivation what had thitherto been forest land. Again, we must remember that Blackburn, J., in enunciating the rule limited it to "the person who for his own purposes" brings the thing on to the land (j). These considerations point to the rule in *Rylands v. Fletcher* not being applicable unless the defendant has purposely accumulated the noxious things on his land. In such a case, if the defendant has caused the accumulation merely by the exercise of his normal rights as a landowner, Goddard, L.J., regards the accumulation as naturally on the land (k), and the decision in *Giles v. Walker* can be explained on the ground that the defendant was only using his land in the ordinary way (l).

3. *Liability if escape actively caused.*—Although a person is not responsible for allowing the escape of things which are naturally on his land, he is responsible for causing their escape. He is not entitled to relieve his own land of a burden by casting it upon the land of his neighbour. Thus he is responsible for the escape of water from his land, if the escape is due to some embankment, channel or other artificial structure made or maintained by him there, or to any other alteration in the natural condition of his land (m).

So in *Whalley v. The Lancashire and Yorkshire Railway Co.* (n), a railway embankment caused an accumulation of flood-water, and in order to get rid of this accumulation (which was endangering the safety of the railway) the defendant railway company pierced the embankment and so caused the flood-water to escape in a concentrated volume and with destructive violence into the adjoining land of the plaintiff, where it did more harm than if the flood had reached his land in the ordinary course of gravitational flow unobstructed by the embankment. It was held that the company was liable for the damage so done. This decision, however, must not be treated as any authority for the general

(j) L. R. 1 Ex. p. 279.

(k) *Rouse v. Gravelworks, Ltd.*, [1940] 1 K. B. pp. 504–5. But *vide infra*, s. 138 (6). On the other hand it would appear that if the rocks in *Pontardawe R. D. C. v. Moore-Gwynn*, [1929] 1 Ch. 656, had become dangerous as the result of quarrying, Eve, J., would have held the defendant liable.

(l) Or, as by Goodhart, *Essays*, p. 156, on the ground that "the comparatively harmless thistledown did not constitute a nuisance". Goodhart in this very ingenious article (pp. 151 *sqq.*) denies that the rule in *Rylands v. Fletcher* does not cover things naturally on the land. Cp. Noel in 56 H. L. R. pp. 778–81.

(m) *Hurdman v. N. East Ry.* (1878), 3 C. P. D. p. 173 *per cur.*; *Broder v. Saillard* (1876), 2 Ch. D. 692, is a similar decision. Contrast *Bartlett v. Tottenham*, [1932] 1 Ch. 114.

(n) (1884), 13 Q. B. D. 131.

proposition that a landowner may not lawfully remove from his land an embankment or other artificial structure which serves as a protection to the adjoining land of his neighbour against the natural flow of flood-water. In the absence of contract, grant, prescription or other sufficient source, there is no obligation to maintain in existence for the benefit of his neighbour any such *de facto* protection against flood-water (o). If, therefore, the railway company, in the above case, could have shown that by cutting their embankment they did no more than restore the natural state of things by removing an artificial obstruction to the natural flow of flood-water, and that the water so released had done no more damage to the plaintiff's land than if the embankment had never been erected, the plaintiff would have had no cause of action. This, however, was not the case. The railway company first accumulated a body of flood-water and then discharged it in a concentrated and destructive stream upon the plaintiff's land.

4. *Liability of mine-owners*.—An exception to the general principle that a person is liable for causing the escape of water from his land into that of his neighbour was established in the case of mine-owners in *Smith v. Kenrick* (p). It is now well settled that no action will lie for the escape of water by natural gravitation into the plaintiff's mine, if this escape is caused merely by the working of the defendant's mine in the ordinary manner. "Each mine-owner has all rights of property in his mine, and among them the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if, while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature" (q). It makes no difference that the damage complained of was the known and necessary result of the defendant's operations.

It is now clear that this principle does not apply only as between one mine-owner and another. Cotton, L.J., in *Hurdman v. N. E. Ry.* (r), said that the explanation of this rule was "this principle,

(o) *Mason v. Shrewsbury and Hereford Ry.* (1871), L. R. 6 Q. B. 578; *Nield v. London and N. W. Ry.* (1874), L. R. 10 Ex. 4; *Thomas & Evans, Ltd. v. Mid-Rhondda Co-operative Society*, [1941] 1 K. B. p. 391.

(p) (1849), 7 C. B. 515, followed in *Baird v. Williamson* (1863), 15 C. B. (n.s.) 376, and *Wilson v. Waddell* (1876), 2 A. C. 95.

(q) *Baird v. Williamson* (1863), 15 C. B. (n.s.) p. 391.

(r) (1878), 3 C. P. D. p. 174; *Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. p. 140; *Rylands v. Fletcher* (1868), L. R. 3 H. L. p. 338. Sir John Salmond found the distinction difficult of acceptance. "It is not easy", he said (6th ed.,

that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land". So in *Rouse v. Gravelworks, Ltd.* (s), where, as a result of quarrying gravel, water was accumulated in the excavations and being blown by the wind injuriously affected the plaintiff's field, it was held that he had no cause of action. But it is in these cases of mines that we shall find the historical origin<sup>1</sup> of the distinction between natural and non-natural user.

The rule in *Smith v. Kenrick* (t) applies only to the escape of water by natural gravitation in consequence of the ordinary mining operations of the defendant. A mine-owner is liable if he, whether purposely or not (u), discharges water from his own mine into that of the plaintiff, otherwise than as an ordinary incident of mining (v).

5. *Prevention of entrance of flood-water.*—The act of preventing the entrance of flood-water is lawful, even though the known and necessary consequence is to cast that water upon the land of one's neighbour. Therefore a man may embank his land against floods, regardless of the effect upon adjoining lands (w). He is not bound to receive flood-water upon his land, as he is bound to receive water that confines itself to the channel of a stream. This being so, it can make no difference whether the protective embankment is actually on the boundary of the defendant's land, or is inside that boundary, so long as its effect is merely to prevent the flow of flood-water across his land (x). If, however, the defendant so embanks his land as to remove from it flood-water which has already obtained entrance, and to cast it upon adjoining land of the plaintiff to which it would not have had access had it not

s. 62 (5), n. (b)), "to see how the excavation of a coal-mine is a natural use of land, and the excavation of a reservoir a non-natural use of it." See above, s. 137 (3).

(s) [1940] 1 K. B. 489.

(t) (1849), 7 C. B. 515.

(u) *Crompton v. Lea* (1874), 19 Eq. 115.

(v) *Westminster Brymbo Coal and Coke Co. v. Clayton* (1866), 36 L. J. Ch. 476; *Baird v. Williamson* (1868), 15 C. B. (n.s.) 376.

(w) *Lagan Navigation Co. v. Lambeg Bleaching Co.*, [1927] A. C. 226. So also in *Greyensteyn v. Hattingh*, [1911] A. C. 355, it was held lawful to drive back a swarm of locusts from entering the defendant's land, even though they were thereby caused to go or remain upon the neighbouring land of the plaintiff. Presumably, also, it is not actionable to drive mischievous animals, e.g., birds, vermin or trespassing cattle off one's land, even though the natural consequence is that they enter upon the land of other persons, provided that they are not directly driven upon that land so as to constitute a trespass.

(x) *Gerrard v. Crowe*, [1921] 1 A. C. 395.

first come upon the defendant's land, there is doubtless a good cause of action (y).

(c) *Natural user not to be confused with things naturally on land.*—It is a mistake, as is sometimes done (z), to confuse the rule relating to things naturally on the land with the rule relating to the natural user of land. The true principle was laid down by Lawrence, L.J., in *Bartlett v. Tottenham* (a). “Broadly the rule in *Fletcher v. Rylands* applies only to things artificially brought or kept upon the defendant's land, and has no application to things which are naturally there. Even in the case where things are artificially brought or kept upon the defendant's land, questions may arise whether the defendant is liable to his neighbour for their escape if he is only putting his land to its natural use.”

### § 139. First Exception: Consent of the Plaintiff

1. *Exceptions.*—The rule in *Rylands v. Fletcher* is subject to a number of important exceptions, there being particular classes of cases in which the occupier is either not liable at all, or not liable in the absence of negligence. When stated without the exceptions, it is, as Scrutton, L.J., pointed out (b), a rule of “absolute liability, but there are so many exceptions to it that it is doubtful whether there is much of the rule left”.

2. *Consent of plaintiff a defence except to action of negligence.*—The rule in *Rylands v. Fletcher* is not applicable to the escape of things brought or kept upon his premises by the defendant with the consent of the plaintiff. In such cases the defendant is not liable except for negligence (c). Although not so limited (d), this principle finds its chief application in those cases in which the different storeys of a building are in the occupation of different

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(y) In an action for causing the escape of flood-water it is a good defence that the same damage would have happened in any case by the unaided action of the flood, even though the defendant had done nothing: *Thomas v Birmingham Canal Co.* (1879), 49 L. J. Q. B. 851.

(z) 8 Camb. L. J. pp. 895-6.

(a) [1932] 1 Ch. p. 131.

(b) *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. p. 6. This would seem to be the view of Lord Greene, M.R.: *Makin, Ltd. v. L. & N. E. Ry.*, [1943] K. B. p. 470, and of du Parcq, L.J., who said in *Read v. Lyons & Co.* (1944), 61 T. L. R. pp. 155-6, that in general the scope of the rule had been restricted rather than enlarged: “the Courts in modern times have been vigilant to prevent the ‘mediaeval principle’ from breaking bounds and invading areas of law in which it has no place.”

(c) *Att.-Gen. v. Cory Bros. & Co.*, [1921] 1 A. C. 521, 539.

(d) *Kiddle v. City Business Properties*, [1942] 1 K. B. p. 274, per Goddard, L.J.

persons, and the occupant of a lower storey complains of the damage done by the escape of water from an upper storey. Whether this water is rain-water collected from the roof, or water supplied *ab extra* in pipes, it is settled law that there is no liability for any such escape in the absence of proved negligence on the part of the upper occupant (e). For in such cases the water has been collected or brought there for the mutual benefit and with the express or implied consent of both parties; there is therefore no sufficient reason why the risk of accident should lie upon the upper rather than upon the lower occupant, and the only duty is one of reasonable care. The same principle would doubtless apply to an escape of gas or any other deleterious substance which is there with the consent of and for the mutual benefit of the occupants. In most of these cases the benefit of the water or other thing is common to both parties, but the mutual benefit, though an important element in showing that there was consent, is not decisive. The exception really depends upon consent, upon the fact that the defendant has taken the premises as they are and must put up with the consequences (f).

It would also seem clear that there is no liability where the plaintiff has consented to run the risk of injury. Whether the consent is a true consent is a question for the jury, and juries are reluctant to find in such cases that a true consent has been given (g).

#### § 140. Second Exception: Default of the Plaintiff

The rule in *Rylands v. Fletcher* is not applicable where the escape was owing to the plaintiff's default (h). Again, if the plaintiff is a trespasser on land he cannot complain of the things he may find there, nor if he goes out of his way to encounter danger can he blame the defendant for any harm he may suffer (i). "No

(e) *Carstairs v. Taylor* (1871), L. R. 6 Ex. 217; *Ross v. Fedden* (1872), L. R. 7 Q. B. 661; *Rickards v. Lothian*, [1913] A. C. 268.

(f) *Peters v. Prince of Wales Theatre*, [1943] K. B. 79, distinguishing *Humphries v. Cousins* (1877), 2 C. P. D. 299, and explaining *Western Engraving Co. v. Film Laboratories*, [1936] 1 A. E. R. 106. See also *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 120.

(g) *Cp. Whitby v. Brock* (1888), 4 T. L. R. 241 (spectator struck by firework at a firework display); *McKee v. Malcolmson*, [1925] N. I. 120 (spectator killed at motor speed trials).

(h) *Fletcher v. Rylands* (1866), L. R. 1 Ex. p. 279, *per* Blackburn, J.

(i) *Charlesworth*, pp. 38-40. *Cp. Holden v. Liverpool New Gas and Coke Co.* (1846), 3 C. B. 1; *Lomax v. Stott* (1870), 39 L. J. Ch. 834; *Stansfield v. Bolling* (1870), 22 L. T. 799; *Postmaster-General v. Liverpool Corporation*, [1923] A. C. 587; *The Mostyn*, [1927] P. p. 47, *per* Sargant, L.J.

action at law can be maintained for an injury which has been brought about by the wilful and intentional act of the party complaining, as its proximate and immediate cause, such act having been done by him with his eyes open, in other words, with a knowledge that the injury would be the probable consequence of the act so done by him" (k). So also where the damage would not have occurred but for the non-natural user of the plaintiff's property the defendant will not be liable under this rule (l).

### § 141. Third Exception: The Act of a Stranger

1. *No liability for the wrongful act of a stranger.*—The rule in *Rylands v. Fletcher* is not applicable to damage done by the act of a stranger. Thus, if a trespasser lights a fire on my land, I am not liable if it burns my neighbour's property (m), unless with knowledge or presumed knowledge of its existence I have failed to extinguish it within a reasonable time (n). So in *Box v. Jubb* (o) the defendants were held not responsible for damage done through an overflow from their reservoir, when that overflow was caused by the act of a third person who emptied his own reservoir into the stream which fed that of the defendant. Kelly, C.B., said: "The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control." So in *Rickards v. Lothian* (p) it was held by the Privy Council on this ground that the occupier of an upper storey was not liable for damage done to the occupier of a lower storey by the escape of water from a lavatory, when the escape was caused by the malicious act of a third person. And in this context malicious merely means conscious or

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(k) *Per* Cockburn, C.J., in *Dunn v. Birmingham Canal Co.* (1872), L. R. 7 Q. B. 244. In *Miles v. Forest Rock Granite Co.* (1918), 34 T. L. R. 500, the Court of Appeal appear to have held that a plaintiff who persisted in walking along a highway in spite of warnings of a coming explosion from blasting operations and was injured by a piece of stone, was none the less able to recover. *See quære?*

(l) *Eastern and South African Telegraph Co. v. Cape Town Tramways*, [1902] A. C. 381. *Cp. British-American Tobacco Co., Ltd. v. Jones* (1925), 134 L. T. p. 407, *per* Scrutton, L.J. *Supra*, s. 54 (7). *Contra* apparently *Astbury, J., in Hoare & Co. v. McAlpine*, [1923] 1 Ch. 167, criticised, Pollock, 390, n. (g).

(m) *Black v. Christchurch Finance Co.*, [1894] A. C. 48; *Beaulieu v. Finglam* (1401), Y. B. 2 Hen. IV, f. 18, pl. 5.

(n) *Vide supra*, s. 57 (8).

(o) (1879), 4 Ex. D. 76. *Cp. Wilson v. Newberry* (1871), L. R. 7 Q. B. 31.

(p) [1913] A. C. 263. *Cp. Dominion Natural Gas Co. v. Collins*, [1909] A. C. 640; *Nichols v. Marsland* (1875), L. R. 10 Ex. p. 259, *per* Bramwell, B.; *Gill v. Edouin* (1894), 15 R. p. 112.

deliberate (q). The negligence of a third party in doing a deliberate act does not involve the occupier in liability under the rule in *Rylands v. Fletcher* (r).

2. *Who is a stranger.*—It does not clearly appear, however, who is to be deemed a stranger within the meaning of this rule. The term certainly includes a trespasser, and also any person who, without entering on the defendant's premises at all, wrongfully and without the defendant's authority causes the escape of dangerous things from those premises: as in the case of *Box v. Jubb* (s) itself (t). It is equally clear that the term stranger does not include any person employed or authorised by the defendant to deal in any way with dangerous things on his land; for the acts of such a person, even though he is an independent contractor, and even though he acts in excess or disregard of his authority, the occupier is vicariously liable (u). But what shall be said of persons lawfully upon the defendant's land with his permission, but without authority to bring upon it, or to deal with, dangerous things—for example, the members of his family, his servants, his guests, or licensees permitted to use the land? It is submitted that for the acts of all such persons in bringing or keeping dangerous things on the premises, or in meddling with such things already on the premises, the occupier is liable under the rule in *Rylands v. Fletcher* (w).

3. *Negligence in not preventing damage by strangers.*—But an occupier may be liable in negligence for the acts of strangers even though he escapes liability under the rule in *Rylands v. Fletcher*. Where the stranger's act is of a kind which ought to have been anticipated and guarded against he will be liable for a failure to

(q) *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 119. Cp. *Dominion Natural Gas Co. v. Collins*, [1909] A. C. p. 647.

(r) *Smith v. G. W. Ry.* (1926), 42 T. L. R. 391, *per* Avory, J.; *Stevens v. Woodward* (1881), 6 Q. B. D. 318. But see Cl. & L. pp. 483-4. If a ship negligently navigated by a third party collides with a wall keeping in water accumulated on my land and so causes my neighbour's land to be flooded, am I liable? *Quære!* Cp. *Greenwood's Tileries v. Clapson* (1937), 156 L. T. pp. 368-9.

(s) (1879), 4 Ex. D. 76.

(t) It also includes a servant acting in a place to which he is forbidden access. So in *Stevens v. Woodward* (1881), 6 Q. B. D. 318, where a servant washed his hands in a private lavatory where he had no right to go and forgot to turn off the tap he was treated as a stranger.

(u) *Black v. Christchurch Finance Co.*, [1894] A. C. 48; *Hale v. Jennings Bros.*, [1938] 1 A. E. R. p. 583.

(w) This may be inferred by analogy from such cases as *Beaulieu v. Finglam* (1401), Y. B. 2 Hen. IV, f. 18, pl. 5, and *Lawrence v. Jenkins* (1875), L. R. 8 Q. B. 274. See, however, the observations of Eve, J., in *Whitmores, Ltd. v. Stanford*, [1909] 1 Ch. at p. 498. See also Winfield, p. 534.

take reasonable care (x). Thus in *Northwestern Utilities v. London Guarantee and Accident Co.* (y) the appellants, who were carrying gas at high pressure, were held liable when an hotel insured by the respondents was destroyed owing to the escape of gas due to a leak caused by the operations of third persons, since those operations were conspicuous, and the appellants were under a duty to exercise reasonable care that the respondents should not be damaged.

### § 142. Fourth Exception: The Act of God

1. *No liability for the act of God.*—The rule in *Rylands v. Fletcher* is not applicable to damage caused by the act of God. The authority for this important limitation upon the rule of absolute liability, the possibility of which was recognised by Blackburn, J., himself in his judgment (z), is the decision of the Court of Appeal in *Nichols v. Marsland* (a). The defendant was in possession of certain artificial pools formed by damming a natural stream. The embankments and weirs were well and carefully constructed and were adequate for all ordinary occasions. A very violent storm, however—described by witnesses as the heaviest within human memory—broke down the embankments, and the rush of water down the stream carried away certain bridges, in respect of which damage the action was brought. It was held, notwithstanding *Rylands v. Fletcher*, that the defendant was not liable, inasmuch as the jury had found that there was no negligence on the part of any one, and that the accident was due directly to the act of God. In the case of *Rylands v. Fletcher*, on the contrary, the accident was due to negligence on the part of the contractors by whom the reservoir was built, and for that negligence the owners of the reservoir were held liable (b).

The case of *Nichols v. Marsland* is complicated by the fact that the acts of the defendant included interference with the course of a natural stream by the erection of a dam. In this aspect the case is the subject of discussion and comment in *Greenock Corporation v. Caledonian Ry.* (c), a case relating to the extent of the liability of

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(x) *Shiffman v. Order of St. John*, [1936] 1 A. E. R. p. 561; *Hale v. Jennings Bros.*, [1938] 1 A. E. R. p. 585. See also 1 Mod. L. R. pp. 56-7.

(y) [1936] A. C. 108.

(z) *Fletcher v. Rylands* (1866), L. R. 1 Ex. p. 280.

(a) (1876), 2 Ex. D. 1.

(b) So in *Carstairs v. Taylor* (1871), L. R. 6 Ex. 217, in which the defendant was held not responsible for an escape of water from his cistern through a hole made in it by a rat, one of the grounds of the decision was that such an accident was a case of *vis major*.

(c) [1917] A. C. 556.



one who so interferes with a stream. No doubt was cast on the general principle that the act of God constitutes an exception to the rule of absolute liability established by *Rylands v. Fletcher*, but it was clearly the view of the House of Lords that, at any rate in Scotland, extraordinary and unprecedented rainfall could never be such an act of God, and that *Nichols v. Marsland* must be taken to have been decided solely on the finding of the jury in that case that the rainfall was such an act of God (*d*). Similarly in *Att.-Gen. v. Cory Bros.* (*e*) Scrutton, L.J., said that it was clear that heavy rainfall in the Rhondda Valley could not be regarded as an act of God, and thought it difficult to reconcile the decision in *Nichols v. Marsland* with *Rylands v. Fletcher*. Oliver, J., seems to have taken the same view about heavy snow-storms in England (*f*). These dicta throw considerable doubt upon the validity of *Nichols v. Marsland* as an authority, but Lord Wright has said that a rainfall at Mill Hill might be so exceptional as to be regarded as an act of God and provide a good defence (*g*).

2. *Act of God defined.*—*Nichols v. Marsland* is, it is believed, the only reported case in which the act of God proved successful as a defence to an action under the rule in *Rylands v. Fletcher*. This exception is therefore not one of great practical importance, but it is necessary to ascertain precisely what is meant by the term act of God, as used in this connection. Although Lord Phillimore has said (*h*) that “this untheological expression is well understood by lawyers”, there has been great difference of opinion upon the meaning to be given to the phrase. It seems clear that the defence of act of God is “distinct from inevitable accident” (*i*), although it may be merely a species of that larger genus (*k*).

It seems fairly clear also that in order that an accident may be

(*d*) Cp. *City of Montreal v. Watt*, [1922] 2 A. C. 555 (same rule in Canada).

(*e*) (1919), 35 T. L. R. p. 574. Cp. *S. C.*, [1921] 1 A. C. p. 536, *per* Lord Haldane.

(*f*) *Slater v. Worthington's Cash Stores*, [1941] 1 K. B. p. 492.

(*g*) *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 889. So in *Makin, Ltd. v. L. & N. E. Ry.*, [1943] 1 A. E. R. p. 366; [1943] K. B. 467, the Court of Appeal were prepared to assume (without deciding) that it was an act of God when lightning uprooted a tree, which caused the breaking of a canal bank, which owing to heavy rain resulted in a flood. As to snow, see *Fenwick v. Schmalz* (1868), L. R. 3 C. P. p. 316, and *Slater's Case*, *ubi supra*.

(*h*) *Great Western Ry. v. Owners of S.S. Mostyn*, [1928] A. C. p. 93.

(*i*) *Trent and Mersey Navigation v. Wood* (1785), 4 Doug. p. 291, *per* Lord Mansfield. Cp. *Oakley v. Portsmouth Steam Packet Co.* (1856), 11 Ex. 618. See also *Gold in Bell Yard*, May, 1938, pp. 5-6.

(*k*) *Per Cockburn, C.J.*, in *Nugent v. Smith* (1876), 1 C. P. D. p. 435, cited in next paragraph. Cp. *Makin, Ltd. v. L. & N. E. Ry.*, [1943] K. B. pp. 475, 478; *Williams, Animals*, p. 3.

an act of God it must have resulted directly from natural causes without human intervention (l). In the leading case of *Nugent v. Smith* (n), a case dealing with the liability of common carriers, the term in question is thus defined by James, L.J.: "The act of God is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him." "What is the act of God?" says Lord Mansfield in *Forward v. Pittard* (n). "I consider it to mean something in opposition to the act of man." "All causes of inevitable accident, *casus fortuitus*", says Cockburn, C.J., in *Nugent v. Smith* (o), "may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man." The act of God is the opposite of the act of man.

Thus, if a ship is driven ashore by a tempest, this is the act of God; but if it is run ashore during a fog by a mistake, however inevitable, on the part of the captain, this is the act of man (p). So if a building is set on fire by lightning, this is the act of God; but not so if a similar accident happens through the upsetting of a lamp by human agency, even though this was due to no negligence. It is true that in most cases human and natural agency co-operate to produce the result, but the immediate and direct cause is alone to be looked at in determining whether the act is that of God or man. When a ship is cast away in a tempest, this would not have happened but for the act of the owner in sending her to sea, but the loss is the act of God for all that. On the other hand, when man,

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(l) Cp. *The Mostyn*, [1927] P. p. 34, per Atkin, L.J. Sir John Salmond thought otherwise; he defined an act of God as "any event which could not have been prevented by reasonable care on the part of anyone". He thought act of God had a different meaning under the rule in *Rylands v. Fletcher* from that which it had in the carrier cases. For a detailed exposition of the reasons and authorities which make it difficult to agree with him, see 7th ed., s. 98. He also identified act of God with *vis major*. But if the act of God covers *vis major* it will also cover the malicious act of a stranger, and it is unnecessary to separate these two heads of defence; for the malicious act of a stranger is *vis major*: *Rickards v. Lothian*, [1913] A. C. p. 278, per Lord Moulton.

(m) (1876), 1 C. P. D. p. 441.

(n) (1855), 1 T. R. p. 33.

(o) (1876), 1 C. P. D. p. 435.

(p) *Liver Alkali Co. v. Johnson* (1874), L. R. 9 Ex. 338. Cp. *Great Western Ry. v. Owners of S.S. Mostyn*, [1928] A. C. 57.

as in *Greenock Corporation v. Caledonian Ry.* (q), diverts a natural stream "the responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God". He "must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God" (r).

3. *Act of God and negligence.*—It is at this point that we are faced with the main difficulty in the defence of act of God. It is perfectly clear that it will not always be a defence to show that the damage was caused by a natural cause without human intervention. Shall we therefore limit further the definition of act of God? This is what Lord Westbury did in *Tennent v. Earl of Glasgow* (s) when he spoke of *damnum fatale* occurrences (the Scottish equivalent of act of God) as "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility". That definition was approved by Lords Finlay, Dunedin and Shaw in the House of Lords in *Greenock Corporation v. Caledonian Ry.* (t). And similarly Lord Blanesburgh giving a theological colour to "this untheological expression", spoke (u) of "an irresistible and unsearchable Providence nullifying all human effort".

But it is submitted that in fact these definitions contain the answer to two distinct questions. What is an act of God? When will an act of God relieve from liability? It is submitted that *all* natural agencies, as opposed to human activities, constitute acts of

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(q) [1917] A. C. 556. Cp. *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. pp. 888-90, *per* Lord Wright.

(r) *Per* Lord Wrenbury at pp. 583-4.

(s) (1864), 2 M. (H. L.) 22.

(t) [1917] A. C. 556. So Lord Esher on several occasions gave it as his opinion that an act of God meant an extraordinary circumstance which could not be foreseen, and which could not be guarded against. *Nugent v. Smith* (1875), 1 C. P. D. 34; *Pandorf v. Hamilton* (1886), 17 Q. B. D. p. 675. A similar definition was given by Lord Coleridge, C.J., and Cave, J., in *R. v. Commissioners of Sewers for Essex* (1885), 14 Q. B. D. p. 574. The Court of Appeal in *Nugent v. Smith* held that Lord Esher was wrong, but his view seems to be established by the approval of Lord Westbury's definition in *Greenock Corporation v. Caledonian Ry.*, [1917] A. C. 556.

(u) *G. W. Ry. v. Owners of S.S. Mostyn*, [1928] A. C. p. 105.

God, and not merely those which attain an extraordinary degree of violence or are of very unusual occurrence. The distinction is one of kind and not one of degree (*v*). The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care; if it could not, then it is an act of God which will relieve from liability, howsoever trivial or common its cause may have been (*w*). ,

If this be the correct view then the unpredictable nature of the occurrence will go only to show that the act of God in question was one which the defendant was under no duty to foresee or provide against. It is only in such a case that the act of God will provide a defence (*x*). So in *Nitrophosphate, etc., Manure Co. v. London and St. Katherine Docks Co.* (*y*), in a case where the defendants were sued for damage done by an unusually high tide, owing to their retaining bank not being sufficiently high, Fry, J., said: "In order that the phenomenon [*i.e.*, the tide] should fall within that rule [with regard to the act of God] it is not . . . necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated." But in *R. v. Essex Sewers Commissioners* (*z*) Lord Coleridge, C.J., said that as soon as it was shown by experience that a tide of that height might occur, "the danger of its recurrence was a danger that could be foreseen in the future, and might be guarded against, whether it could have been foreseen in the past or not".

Whether there is a duty to take precautions against extra-

(*v*) In *Makin, Ltd. v. L. & N. E. Ry.*, [1943] K. B. p. 478, Goddard, L.J., said: "Every act of God which causes injury may be called an accident, although not every accident is an act of God." If the statement in the text is correct this needs qualification. A fall of snow is an act of God, but it is not an accident, *Vide supra*, s. 5 (*5*).

(*w*) *Nugent v. Smith* (1876), 1 C. P. D. pp. 440, 442, *per* Cockburn, C.J., at pp. 435-6; Mellish, L.J., and Cleasby, B., *contra*.

(*x*) Thus it is submitted that a man's death from natural causes is always an act of God, *cp.* Lord Porter in *Constantine (Joseph) S.S. Line v. Imperial Smelting Corporation*, [1942] A. C. p. 202, but his death will only relieve from liability if it could not reasonably have been foreseen or provided against as in *Ryan v. Young*, [1938] 1 A. E. R. 522, where a lorry driver suddenly collapsed and died as a result of latent fatty degeneration of the heart.

(*y*) So a violent gale blowing down a tree, *Hudson v. Bray*, [1917] 1 K. B. 520, or a branch from a tree, *Radley v. L.P.T.B.*, [1942] 1 A. E. R. p. 434, may relieve from liability as an act of God, yet a strong gust of wind may not: *Hills & Sons v. British Airways* (1936), 56 Ll. L. Rep. 20. *Cp. Cushing v. Walker & Son*, [1941] 2 A. E. R. p. 695. But these last three cases were actions in negligence, on which *vide infra*, n. (*bb*).

(*z*) (1885), 14 Q. B. D. p. 574. *Cp. Greenwood's Tileries v. Clapson* (1937), 156 Ll. T. p. 389.

ordinary events depends on the facts in each case (a). So Bramwell, B., speaking of an extraordinary storm, said (b): "We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen. There is a French saying that 'there is nothing so certain as that which is unexpected'. In like manner, there is nothing so certain as that something extraordinary will happen now and then." And in cases falling under the rule in *Rylands v. Fletcher* the law exacts that "high degree of care, amounting in effect to insurance against risk" which Lord Macmillan said (bb) was extracted from those who take the responsibility of giving out such dangerous things as loaded firearms. In *Rylands v. Fletcher* cases, therefore, we cannot treat liability for such acts of God as do not provide a good defence as completely analogous to the liability for negligence in not preventing damage by strangers (c).

### § 143. Fifth Exception: Statutory Authority

1. *Absolute liability excluded by statutory authority*.—The rule in *Rylands v. Fletcher* is not applicable where the defendant acted in pursuance of special statutory authority in placing the dangerous thing on the land from which it escaped. In *Green v. Chelsea Waterworks Co.* (d) a main belonging to the defendant company burst, and the water flooded the plaintiff's premises. It was held by the Court of Appeal that the company, being authorised by Act of Parliament to lay the main, and having been guilty of no negligence, was not liable in damages to the plaintiff. Lindley, L.J., speaking of the rule in *Rylands v. Fletcher*, says (e): "It is possible that that principle might have been applied to companies

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(a) (1878), 9 Ch. D. p. 515. Fry, J., based himself upon the judgment of Mellish, L.J., in *Nichols v. Marsland*. This test was adopted by Atkin, J., in *Baldwin's, Ltd. v. Halifax Corporation* (1916), 85 L. J. K. B. 1769.

(b) *Ruck v. Williams* (1858), 3 H. & N. p. 318. Cp. Iyer, pp. 278-9.

(bb) *Donoghue v. Stevenson*, [1932] A. C. p. 612. *Contra* Cockburn, C.J., in *Nugent v. Smith* (1876), 1 C. P. D. p. 488; and in *Nichols v. Marsland* itself Bramwell, B., said: "I admit that it is not a question of negligence. A man may use all care to keep the water in . . . but would be liable if through any defect, though latent, the water escaped." Clearly, where the liability sought to be imposed arises only from negligence, it is unnecessary to determine whether all the requirements of an act of God are fulfilled: Atkin, J., in *Baldwin's, Ltd. v. Halifax Corporation* (1916), 85 L. J. K. B. p. 1774.

(c) *Supra*, s. 141 (b).

(d) (1894), 70 L. T. 547. Cp. *Markland v. Manchester Corporation*, [1934] 1 K. B. 566; *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. 108. See authorities collected in Robinson, *Public Authorities*, pp. 169-74.

(e) *Green v. Chelsea Waterworks*, *supra*, at p. 549.

having statutory authority to make railways or carry water, but the Court has declined to extend it to such cases. . . . That case is not to be extended beyond the legitimate principle on which the House of Lords decided it" (f).

2. *Unless the statute otherwise provides.*—Even, however, where special statutory authority exists, it does not exclude the rule in *Rylands v. Fletcher* if the statute, as not infrequently happens, contains an express provision that nothing therein is to affect the liability of the company or person so authorised for any nuisance resulting from the exercise of the statutory power (g).

3. *Liability for negligence of independent contractor.*—Notwithstanding statutory authority, the defendant may be liable if the accident is due to negligence, even though the negligence is that of an independent contractor. Thus, in *Hardaker v. Idle District Council* (h) the defendants were held liable for an escape of gas from the street into the plaintiff's house, although the only negligence was that of an independent contractor, and although the defendants were acting under statutory authority (i).

### § 144. Liability for Fire

1. Liability for damage done by the spread of fire was established many centuries before the rule in *Rylands v. Fletcher* was formulated and the usual remedy was trespass upon the case for negligently allowing one's fire to escape in contravention of a general custom of the realm (k). But it has now been held to fall within the rule in *Rylands v. Fletcher*, and in general liability for fire is governed by the same principles as those which determine liability for the escape of any other dangerous thing (l). For certain reasons, however, and chiefly because of the existence of a

(f) It has been suggested that this exception is based on the fact that defendant has not brought the dangerous thing upon the land "for his own purposes". Bohnen, *Studies*, p. 409. Sir John Salmond, however, regarded it as illogical, and due to a desire on the part of the Courts to keep within the narrowest possible limits a rule which he regarded with so much dislike. See 7th ed., pp. 365-6.

(g) *E.g.*, Reservoirs (Safety Provisions) Act, 1930, s. 7. *Cp. Makin, Ltd. v. L. & N. E. Ry.*, [1943] K. B. 467, and see *Midwood & Co. v. Corporation of Manchester*, [1905] 2 K. B. 597; *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

(h) [1896] 1 Q. B. 835.

(i) As to the effect of statutory authority generally, see s. 9, *supra*.

(k) For the history, see Winfield, pp. 541-3.

(l) See Winfield in 4 *Camb. L. J.* pp. 203-6, and *Torts*, pp. 542, 546-7. He points out that it is uncertain whether "inevitable accident" (as in the old action upon the case for fire) or "act of God" (as in *Rylands v. Fletcher*) is the defence applicable now in the case of damage done by escaping fire.

statute which bears upon the matter, this form of injury is one which requires separate consideration.

*Liability for fire governed by statute.*—The statute referred to is the Fires Prevention (Metropolis) Act, 1774 (*m*), which provides “that no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin”. This Act repealed certain earlier provisions to the same effect; the first of them being 6 Anne, c. 31, which, however, extended only to fires in a “house or chamber”. The natural interpretation of this very ill-drawn enactment is that it abolishes all liability for accidental fires, whether they are due to negligence or not, and this is the construction put upon the Act of Anne by Blackstone in his Commentaries (*n*). Yet whatever may have been the real intention of the Legislature, it has been finally determined by the judgment of the Court of Queen’s Bench in *Filliter v. Phippard* (*o*) that the statute extends only to inevitable accident, and that fires due to negligence are still a source of liability. In *Musgrove v. Pandelis* (*p*) it was further held that the statute confers no protection even if the fire begins without negligence, provided that the spread of it which did the mischief complained of was due to negligence. The fire which accidentally begins, within the meaning of the statute, is the fire which actually does the mischief and not the fire in its initial and harmless stage (*q*).

2. *For whose negligence occupier is liable.*—This being so, the question arises: For whose negligence in the matter of fire is the occupier of the land responsible; only for his own, or also vicariously for that of other persons? This question is left open by *Filliter v. Phippard*, but receives a partial answer in the case of *Black v.*

(*m*) S. 86. This provision is not limited locally: *Filliter v. Phippard* (1847), 11 Q. B. 347. This section does not afford a defence to a warehouseman who in breach of contract is still in possession of goods which he should have re-delivered before the fire broke out: *Shaw & Co. v. Symmons & Sons*, [1917] 1 K. B. 799.

(*n*) I. 431.

(*o*) (1847), 11 Q. B. 347.

(*p*) [1919] 2 K. B. 43. Cp. *Collingwood v. Home and Colonial Stores* (1936), 155 L. T. p. 552, per Lord Wright, M.R.

(*q*) It has been said that in such a case there are two fires: *Musgrove v. Pandelis*, [1919] 2 K. B. 43. It is, however, doubtful whether there is any substance in the distinction. Duke, L.J., at p. 51, thought not; and Scrutton, L.J., in *Job Edwards v. Birmingham Canal Navigations*, [1924] 1 K. B. p. 361, thought that instead of speaking of two fires it was “safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire”.

*Christchurch Finance Co. (r)*, in which the occupier was held liable for the act of an independent contractor who negligently and in disregard of his instructions lit a fire on the defendant's property at a dangerous and improper season of the year. There seems no reason for supposing that the liability of an occupier for damage by fire is any more restricted than his liability for the escape of any other dangerous substance (s).

*Statute merely declaratory.*—If this is so, the statute of 14 Geo. III as interpreted by *Filliter v. Phippard* is probably merely declaratory of the common law, for this seems to be the rule indicated by the common-law decisions prior to the Act of Anne. Thus, in 1401 in *Beaulieu v. Finglam (t)*, Markham, J., after saying that in such a case a man is bound to answer for the acts of his servant or his ostler, added: "I shall have to answer to my neighbour for any one who enters my house by my will or my knowledge, or is received by me or by my servant as a guest, if he do any act (as with a candle or anything else) by which my neighbour's house is burned (u). But if a man from outside my house, against my will, puts fire into the thatch of my house or anywhere else, whereby my house is burned and in consequence my neighbours' houses are burned too, I shall not be bound to answer to them for this" (w). A servant acting outside the scope of his employment, as by cleaning a chimney when not employed to do so, is regarded as a stranger (x). But even though the fire has been started by a stranger the occupier will be liable if with knowledge or presumed knowledge of its existence he has failed to extinguish it within a reasonable time (y).

3. It is sometimes said (z) indeed, that the common law, before the Act of Anne, held an occupier absolutely liable for damage done by fire independently of any negligence either on his part or on that of any one else. There is, however, no sufficient authority for any such doctrine, and it is contrary to the clear opinion of Holt,

(r) [1894] A. C. 48.

(s) See above, s. 141.

(t) Y. B. 2 Hen. IV, 18, pl. 5. See Kenny's Cases on the Law of Torts, p. 589.

(u) Cp. *Crogate v. Morris* (1617), 1 Brownl. & Goldes. 197.

(w) Cp. Holt, C.J., in *Turberville v. Stampe* (1697), 1 Ld. Raym. 264. For the different reports of Holt, C.J.'s, judgment in this case, see Holdsworth, H. E. L., viii, p. 474.

(x) *McKenzie v. McLeod* (1834), 10 Bing. 385.

(y) *Supra*, s. 57 (8).

(z) E.g., by Lord Wright, M.R., in *Collingwood v. Home and Colonial Stores* (1936), 155 L. T. p. 551.



C.J., and the Court of King's Bench in *Turberville v. Stampe* (w) decided before the Act of Anne. It is there clearly recognised that liability for fire is based on the negligent lighting or care of it. "He must at his peril take care that it does not through his neglect injure his neighbour. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence" (a).

Yet however this may have been before the statute, it is submitted that since the statute there can be no liability for accidental fire in the absence of any negligence on the part of any one concerned. The present law is a rule of vicarious liability for the negligent acts of all persons except mere strangers—not a rule of absolute liability for accidents for which no one is to blame.

4. *Contrary opinion considered.*—It is sometimes maintained (b) that even at the present day, and notwithstanding the statute, liability for fire is absolute and independent of negligence. Those who hold this opinion seek to evade the statute by construing the words "shall accidentally begin" as applicable only to fires that are accidental in their *origin*, and not fires intentionally lit but accidentally spreading and escaping from the defendant's land. The statute would apply, for example, to a fire caused by lightning or spontaneous combustion, but not to one caused by the bursting of a lamp, or where the coal leaps from the grate of an ordinary household fire. This interpretation is suggested in *Filliter v. Phippard* (c) itself as a second and supplementary ground for the decision. It is submitted, however, that it is unsound. It seems sufficiently clear that the statute was not intended to apply solely to fires caused by lightning or spontaneous combustion, and that the accidental burning of a house by the explosion of a lighted lamp is as much within the Act as a similar accident caused by an explosion of gunpowder.

5. *Where the fire is caused by a Rylands v. Fletcher object.*—In *Musgrove v. Pandelis* (d), however, it was held that the statute did not afford a good defence where the rule in *Rylands v. Fletcher* applied. In that case the defendant's motor car caught fire in his garage, over which the plaintiff occupied rooms which were burnt out. It was held that the motor car with its tank full of petrol

(a) 12 Mod. p. 152. See Winfield in 42 L. Q. R. pp. 46–50.

(b) See Cl. & L., pp. 494–6.

(c) (1847), 11 Q. B. 347.

(d) [1919] 2 K. B. 43.

was a mischievous thing within the rule in *Rylands v. Fletcher* and that therefore the defendant must make good the loss. This ground for the decision was doubted in *Collingwood v. Home and Colonial Stores (e)*, in which case the fire was due to the fusing of an electric wire used for ordinary domestic purposes, since it was questioned whether a motor car is a dangerous thing and to keep it in a garage is not an ordinary user of land. But the principle seems correct and was applied by Asquith, J., in *Mulholland v. Tedd, Ltd. (f)* where a twenty-gallon drum of paraffin exploded when it caught fire. So in *Jones v. Festiniog Ry. (g)* and *Powell v. Fall (h)*, the defendants were held liable for fire caused by the escape of sparks from locomotive steam-engines used by them, and it was held to be no defence that all possible care and skill had been used in the construction and management of these engines to prevent the escape of sparks. In neither case was the engine used under any statutory authority which granted any protection against the ordinary rule of liability at common law, and the argument in these two cases was devoted almost wholly to the question whether there was or was not any statutory authority sufficient to save the defendants from their undoubted common law liability (i).

### § 145. The Nature of Liability Under the Rule in *Rylands v. Fletcher*

Sir John Salmond regarded the rule in *Rylands v. Fletcher* as merely one branch of the law of nuisance. In earlier editions of this work the discussion of that rule was to be found imbedded in

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(e) (1936), 155 L. T. p. 553, *per* Romer, L.J. Cp. Lord Wright, M.R., at p. 552.

(f) [1939] 3 A. E. R. 253. But *Collingwood's Case* was not cited.

(g) (1868), L. R. 3 Q. B. 733.

(h) (1880), 5 Q. B. D. 597; *Mansel v. Webb* (1919), 88 L. J. K. B. 323. Sir John Salmond's explanation of these cases (6th ed., s. 70 (4)) was slightly different. But all of them are expressly founded upon the rule in *Rylands v. Fletcher*, and the earliest also upon the common law authorities as to fire quoted in Comyns, Dig. Action upon the Case for Negligence, A 6. It is a noteworthy fact that, since the Court of Exchequer in 1858 (3 H. & N. 743) in a judgment, subsequently reversed on other grounds ((1860), 5 H. & N. 378), in *Vaughan v. Taff Vale Ry.* held that the statute of 1774 did not apply "where the fire originates in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out", the statute has never been relied upon as a defence in railway cases. See Charlesworth, p. 126. In *Powell v. Fall*, the traction engine case, the statute would not be applicable because it only deals with fires originating in the premises or on the estate of the defendant. See Grove's argument for the plaintiff in *Vaughan v. Taff Vale Ry.* (1860), 5 H. & N. p. 684.

(i) The liability of railway companies for fires caused by the escape of sparks or cinders from locomotives is now governed by the Railway Fires Acts, 1905 and 1923. See s. 9 (2), n (s), *supra*.

the midst of the chapter on "Nuisance". Undoubtedly a great many cases in which the rule in *Rylands v. Fletcher* is applied are actions of nuisance, but "nuisance is not only different in its historical origin, but in its legal character and many of its incidents and applications" (k). The rule in *Rylands v. Fletcher* covers a wider field than that covered by nuisance. For private nuisance is limited according to the more usual view to acts interfering with the enjoyment of land and commonly involves the creation of a continuous condition causing or threatening repeated injury. The rule in *Rylands v. Fletcher* is not so limited.

On the other hand many nuisances, e.g., noise and obstruction of light, are outside the rule in *Rylands v. Fletcher*. Professor Winfield has well said (l) that nuisance and the rule in *Rylands v. Fletcher* "are related to one another as intersecting circles, not as the segment of a circle to the circle itself". And there are many other differences between the two (ll).

Some eminent Judges, e.g., Bramwell, B. (m), Stirling, J. (n), Parker, J. (o), and Astbury, J. (p), have regarded the action under the rule in *Rylands v. Fletcher* as in the nature of trespass, the underlying idea being that a man releases some force brought by him on to his own property, which gets beyond his control and injures his neighbour. But clearly in most cases under the rule the injury done to the plaintiff is consequential and not direct (q).

Other writers (r) have regarded the rule in *Rylands v. Fletcher* as a branch of the law of negligence. But it is perfectly clear that a man may be liable under the rule even though neither he nor any one else has been guilty of any negligence in allowing the escape. It is equally clear that he may be liable though he has done no unlawful act in introducing the dangerous thing on to his land. And there are many dicta that a man may be liable without any

(k) *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 119, *per* Lord Wright. Cp. *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. p. 903.

(l) 4 Camb. L. J. p. 195. Cp. *Northwestern Utilities v. London Guarantee Co.*, *ubi supra*.

(ll) These have been well summarised by Winfield in 4 Camb. L. J. pp. 195-7; see also Charlesworth, pp. 65-9. But see Friedmann in 1 Mod. L. R. pp. 39 *sqq.*

(m) *Fletcher v. Rylands* (1865), 3 H. & C. p. 789; *Carstairs v. Taylor* (1871), L. R. 6 Ex. p. 221; *Nichols v. Marsland* (1875), L. R. 10 Ex. 255.

(n) *Foster v. Warblington U. C.*, [1906] 1 K. B. 648.

(o) *Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393.

(p) *Hoare & Co. v. McAlpine*, [1923] 1 Ch. p. 175.

(q) *Supra*, s. 2.

(r) *Vide* Salmond (7th ed.), s. 93 (2), n. (z), and see Charlesworth, pp. 69-74. Cp. Lord Greene, M.R., in *Makin, Ltd. v. L. & N. E. Ry.*, [1944] K. B. p. 470.

negligence on his part (s). At first sight therefore it seems impossible to regard liability under the rule as liability for negligence. It is submitted, however, that this is less obvious if we consider the various meanings of negligence. Negligence may mean a state of mind or actionable conduct (t). There are many instances in the reports of defendants who have been held liable under the rule in *Rylands v. Fletcher* although their minds were not negligent (u). But that is equally true in the case of "statutory negligence" (w). Negligence in the sense of actionable conduct involves the breach of a duty to take care. The breach of such a duty is clear in the case of statutory negligence. Is it absent because in the case of the rule in *Rylands v. Fletcher* the defendant has done no unlawful act if no damage ensue? It is submitted that here also there is a breach of a duty to take care—a breach of the duty to take care not to injure others by keeping mischievous things. In actionable negligence also, as a rule, no wrong, civil or criminal, is done if no damage ensue. We shall see (x) that liability for damage done by animals *feræ naturæ*, though independent of negligence and although it is not unlawful to keep such an animal, is substantially a branch of the law of negligence. We shall also see that such liability is generally identified by the Courts with liability under the rule in *Rylands v. Fletcher* (xx). This is a strong argument for believing that in essence as now applied the rule is one branch of the law of negligence (y). The most important development in the French law of delict during the last sixty years has been the

(s) *E.g.*, per Lords Finlay and Atkinson in *Att.-Gen. v. Cory Bros.*, [1921] 1 A. C. pp. 539, 544.

(t) *Supra*, s. 7 (1). This is not of course to say that all actionable conduct (*e.g.*, trespass) is negligence.

(u) It is no defence that the defendant did not know of the dangerous character of that which he was keeping; it is no defence that there was no reason why he should know: *West v. Bristol Tramways*, [1908] 2 K. B. p. 16, per Phillimore, J. It is no defence even, it seems, that no one knew at the time of the dangerous character of the substance: *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1920] 2 K. B. pp. 500, 515 (dinitrophenol).

(w) *Supra*, ss. 119 (2), 135 (1).

(x) *Infra*, s. 147 (4).

(xx) *Infra*, s. 147 (4). But du Parcq, L.J., said in *Read v. Lyons & Co.* (1944), 61 T. L. R. p. 156, that it was neither, "strictly speaking, appropriate" nor necessary to invoke the rule in *Rylands v. Fletcher* when injury is caused by a ferocious animal to a person who has entered on the land occupied by its owner, and he regards liability for animals *feræ naturæ* as based on "presumed negligence", but not so liability under *Rylands v. Fletcher*.

(y) Cp. Scott, L.J., in *Haseldine v. Daw*, [1941] 2 K. B. pp. 355-6. It is to be regretted that cattle-trespass, which is merely one form of the action of trespass, should ever have been made part of the foundation for the rule in *Rylands v. Fletcher*, *infra*, s. 147 (4). It is submitted that many of the difficulties in connection with the rule are due to this unfortunate synthesis.

acceptance to a great extent of the principle of *le risque créé*, which may be shortly stated as being that the man who for his own purposes or his own profit introduces a dangerous thing into society and thereby creates a risk of injury to his fellows should be responsible for any damage caused (z). The exceptions recognised to the rule are contributory negligence, *force majeure*, *cas fortuit*, and some external cause not imputable to the defendant. "The Courts, it is true, avoid as a rule the term risk and prefer to speak of presumption of fault or presumption of responsibility. But a presumption of fault which cannot be rebutted by proof that there was no fault does in reality mean liability for risk" (a). So it has been argued (b) that the whole ground of the rule in *Rylands v. Fletcher* is covered by the law of negligence (with the principle of *res ipsa loquitur*) and the liability for acts of an independent contractor (i.e., the cases in which the law charges the defendant with a non-delegable duty).

It is submitted that the French doctrine of *le risque créé* will help us to understand the rule in *Rylands v. Fletcher*, and that the principle underlying that rule is that if a man takes a risk, which he ought not to take without also taking upon his own shoulders the consequences of that risk, he must pay for any damage that ensues (c). So in *Att.-Gen. v. Cory Bros.* (d), where some colliery tips slid as a result of excessive rainfall, it was held that the defendants were liable, "for", said Lord Haldane (e), "if such rainfall as could make this enormous heap of stuff slide was a possible occurrence, it was negligent to put it there without taking adequate precautions to secure its stability. The liability may be based on actual negligence . . . or it may be established merely by showing that the hillside was steep, and that to pile rubbish on it in a large heap was to put a dangerous structure there, which was so put at the risk of the company should damage result. The line of demarcation between the proof of negligence and the proof of what is necessary to bring such a case within this well-known principle of *Rylands v. Fletcher* is but a faint one in such circumstances as

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(z) See Walton's valuable article in 49 L. Q. R. pp. 89—92. Also Amos and Walton, pp. 262 *sqq.*; F. H. Lawson in J. C. L., November, 1940, pp. 144—61.

(a) Walton, *loc. cit.* p. 90.

(b) E. R. Thayer in 29 H. L. R. 801, Harvard Essays, 599. Cp. Jeremiah Smith, 33 H. L. R. pp. 553—4, 683—4, Harvard Essays, pp. 625—6, 644—5.

(c) 3 Camb. L. J. pp. 387—97. Cp. Green, Judge and Jury, p. 141.

(d) [1921] 1 A. C. 521.

(e) At p. 536.

we are now considering" (f). Lord Haldane was distinguishing liability under the rule from "actual negligence". It is submitted that though the rule in *Rylands v. Fletcher* was not originally conceived as a branch of the law of negligence and is sprung from different roots it is now in the developed law a growth of the same genus (g). But in practice the distinction between ordinary negligence on the one hand and the negligence which arises from the breach of statutory duties or common law rules of strict liability on the other is still of importance (h).<sup>1</sup> If the plaintiff states his claim on the principle of *Rylands v. Fletcher* he need only plead the escape; if he bases his claim on breach of statutory duty he need only plead the breach of the statute; but if he states his claim in negligence, he must plead negligence.)

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(f) *Rylands v. Fletcher* itself might have been decided on the ground of negligence: Pollock, Preface to 143 R. R., v, vi; Street, Foundations, i, 62-3.

(g) Cp. Lord Macmillan in *Donoghue v. Stevenson*, [1932] A. C. pp. 611-2. "A special instance of negligence, where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety"; and again, "the high degree of care, amounting in effect to insurance against risk." So in *Haseldine v. Daw*, [1941] 2 K. B. pp. 355-6, Scott, L.J., said: In all these cases of strict liability (dangerous chattels, dangerous animals, acts within the *Rylands v. Fletcher* rule) "the actor foresees, or as a reasonable man ought to foresee, danger to persons so placed as to be likely to be affected but whom he has no right in law so to affect. They are all equally referable to the duty of care, although they call for a higher degree of care because of the greater degree of danger to others which their special circumstances make obvious to the actor". See also Friedmann, 1 Mod. L. R. pp. 61-2.

(h) Cp. *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 126.

## CHAPTER XVIII

## LIABILITY FOR ANIMALS

## § 146. Liability for Dangerous Animals (a)

1. *The diverse branches of liability for animals.*—"The responsibility of the owners of animals for damage done by them has developed along two main lines, one a branch of the law of trespass, and the other a branch of the law which imposes upon the owner of a dangerous animal or thing a duty to take measures to prevent it from doing damage." So said Bankes, L.J., in *Buckle v. Holmes* (b). But in addition a man may be involved in liability for damage caused by his animals under the general principles of tort law, for example, for negligence or nuisance. A tendency to forget this important fact has led to a considerable amount of confusion (c), and after dealing with the two special rules applicable to animals, it will be advisable to add a few words on the ordinary actions of negligence and nuisance in cases where liability is incurred for damage caused by animals.

2. *Liability for dangerous animals absolute.*—We will deal first with the special rule governing liability for dangerous animals. Under this branch of the law there are two classes of animals: (1) animals *feræ naturæ*, e.g., a tiger or a gorilla, which are obviously of a dangerous nature, although individual animals may be more or less tamed; (2) animals *mansuetæ naturæ* (d), e.g., a dog, a cow, or a horse, which have in individual cases given indications of the development of a vicious or dangerous disposition (e). The test to be applied in solving the question whether an animal

(a) The leading authority on this subject now is Dr. Glanville Williams' exhaustive treatise "Liability for Animals" (1939).

(b) [1926] 2 K. B. p. 128.

(c) See Winfield, pp. 549-55; Williams, Animals, pp. 340-5.

(d) The distinction in the language of the cases is sometimes made between "wild" animals on the one hand, and "domestic" or "tame" animals on the other, e.g., in *M'Quaker v. Goddard*, [1940] 1 K. B. 687. But this is misleading. The real distinction is between dangerous and harmless. See Williams in 56 L. Q. R. pp. 355-6.

(e) *Buckle v. Holmes*, [1926] 2 K. B. p. 128.

is to be placed in the class of dangerous animals is danger to mankind (f).

He who keeps a dangerous animal keeps it at his peril. Every man is bound at his peril to prevent such animals from going at large or from obtaining in any other manner an opportunity of exercising their mischievous instincts. If any harm is done by them, he is liable without any allegation or proof of negligence, unless there exists some specific ground of exemption.

This rule of absolute liability was established in 1846 by the Court of Queen's Bench in *May v. Burdett* (g). The plaintiff had been bitten by a monkey kept by the defendant upon his premises, and in answer to the contention of the defendant that he was not liable save for want of due care in taking precautions against mischief, it is said by Lord Denman, C.J. (h): "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. . . . The conclusion to be drawn from an examination of all the authorities appears to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril; and that if it does mischief, negligence is presumed without express averment. . . . The negligence is in keeping such an animal after notice."

Although the rule is undoubted, the reason given for it in some of the cases by which it was established—namely, that the very act of keeping a dangerous animal is itself wrongful, and therefore a ground of liability if damage ensues—can no longer be accepted as sound. Even in the case of wild beasts, there is nothing illegal in the possession of them. The keeping of a wild-beast show is a perfectly lawful business, no less than the keeping of cattle, yet tigers and cows will both do mischief after the custom of their kind if they are allowed the opportunity. The keeping of a dangerous animal is to be classed not as a wrongful act but as one of those rightful acts which, notwithstanding their rightfulness, are yet the ground of legal liability if harm ensue therefrom, even by way of

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(f) *Buckle v. Holmes*, [1926] 2 K. B. p. 129; *M'Quaker v. Goddard*, [1940] 1 K. B. p. 695. Cp. Williams, *Animals*, pp. 296-8. Winfield's arguments to the contrary (pp. 578-4) are unconvincing. Once an animal is classified as *fera natura* there is (as he admits) no reason why the liability for damage done by it should be confined to damage to the person.

(g) (1846), 9 Q. B. 101. Followed in the Court of Exchequer in *Jackson v. Smithson* (1846), 15 M. & W. 563, and in the Court of Common Pleas in *Card v. Case* (1848), 5 C. B. 622. For the early history of the *scienter* action, starting with a writ in 1387, see Williams, *Animals*, ch. xv, and Holdsworth in 55 L. Q. R. p. 590.

(h) (1846), 9 Q. B. pp. 110, 112.



inevitable accident (i). So Lord Wright said (j): "It is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage" (k) (l).

8. *Animals mansuetæ naturæ*: Necessity of proving the *scienter*.—When the damage done is natural to the species of an animal *feræ naturæ*, the liability of the defendant is independent of any proof that he knew of this tendency, and it cannot be excluded even by proof that he believed on good grounds that no such tendency existed in the individual case (m). Where, on the other hand, the damage is not natural to the species, affirmative proof is required that the defendant actually knew of the mischievous tendency of the animal. This proof is technically called proof of the *scienter*, from the term *scienter* used in the old writ and declaration, in which the defendant was charged with knowingly keeping a dangerous animal (n). The same form of writ and declaration was used, indeed, even in respect of mischief natural to the species, but in this case the necessary knowledge was conclusively presumed, and the *scienter* did not require to be proved (o). It may be correctly said, therefore, that in all cases the liability of the defendant is based on the knowledge of the animal's mischievous nature, but that in the case of animals *feræ naturæ* where the mischief is natural this knowledge is presumed and constructive; whereas in other cases it is necessary for the *scienter* to be proved.

Thus it is the natural tendency of tigers and other wild beasts to attack mankind and other animals. In such cases, therefore,

(i) *Jackson v. Smithson* (1846), 15 M. & W. 565, *per* Platt, B. Cp. Beven, 22 H. L. R. 465: Harvard Essays, 572. The *Doryphora decemlineata*, commonly called the Colorado beetle, is a statutory exception: Colorado Beetle Act, 1877; whilst under the Destructive Imported Animals Act, 1932, the Minister of Agriculture and Fisheries is given power to prohibit by order the keeping of the *Fiber zibethicus* or *Ondatra zibethica*, commonly known as the musk rat, or musquash and other destructive non-indigenous mammals.

(j) *Knott v. L. C. C.*, [1934] 1 K. B. p. 138.

(k) Liability may attach where the animal is on the defendant's premises, as in *Besozzi v. Harris* (1858), 1 F. & F. 92 (bear on chain). See *Read v. Lyons & Co.* (1944), 170 L. T. p. 421, *per* Cassels, J.; S. C., 61 T. L. R. p. 156, *per* du Parcq, L.J.

(l) The whole of this section (now somewhat abridged) was cited with approval by Singleton, J., in *Could v. M'Auliffe*, [1941] 1 A. E. R. p. 519, affirmed [1941] 2 A. E. R. 527.

(m) *Filburn v. People's Palace Co.* (1890), 25 Q. B. D. 258.

(n) *Quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*: 1 Rolle's Abridg. 4. For the history of the *scienter*, see Wigmore, Harvard Essays, 28-31, 72-3, 7 H. L. R. 325-8, 449-50; A. A. L. H. iii, 490-2, 512-6. The doctrine is peculiar to English law: see notes to *Card v. Case* (1848), 5 C. B. 622.

(o) *Besozzi v. Harris* (1858), 1 F. & F. p. 92, *per* Crowder, J. (a bear).

no proof of the *scienter* is necessary (*p*). On the other hand, it is not the natural tendency of dogs to bite human beings; therefore it is necessary for the plaintiff to prove that the defendant actually knew that the dog was dangerous and had departed from the peaceful habit of its species. And it is not sufficient to prove that he had the means of knowing this, and would have known it had he exercised reasonable care (*q*). Nor is it sufficient in the case of a harmless animal to prove that the defendant knew that it was an ordinary propensity of animals of the class to which it belonged to do the kind of damage complained of (*r*). "One who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following a natural propensity of its kind to do damage in certain circumstances" (*s*). Liability can only be based on the defendant's actual knowledge of the particular animal's past conduct (*t*) and then probably only if it was contrary to the nature of animals of the class to which it belonged (*u*). From which it follows that a man can never be liable if the animal be of such a kind that its individual characteristics cannot be known, *e.g.*, bees.

4. Whether any particular kind of animal is to be classed as *feræ* or *mansuetæ naturæ* is a question of law (*w*). "It is not

(*p*) *May v. Burdett* (1846), 9 Q. B. 101; *Filburn v. People's Palace Co.* (1890), 25 Q. B. D. 258. But, *semble*, the liability for damage done by an animal classed as *feræ naturæ* covers all damage done by it and not only that due to its natural propensities. "A person who keeps such an animal is bound so to keep it that it shall do no damage": *Besozzi v. Harris* (1858), 1 F. & F. p. 98, *per* Crowder, J. See Williams, *Animals*, p. 297.

(*q*) *Mason v. Keeling* (1699), 12 Mod. 332. Where, however, a dangerous horse is supplied under contract, there is a duty to warn not only the other party to the contract but any person who the supplier contemplates or ought to contemplate will use it, and this duty exists, even in the absence of actual knowledge, if the defendant was negligent in not knowing its dangerous nature: *White v. Steadman*, [1913] 3 K. B. 340. But this would seem to be liability for negligence, not on the *scienter*.

(*r*) But such knowledge may land the defendant in liability for negligence. *Infra*, s. 148.

(*s*) *Buckle v. Holmes*, [1926] 2 K. B. p. 180, *per* Atkin, L.J.; *cp. Cutler v. United Dairies*, [1938] 2 K. B. p. 302, *per* Scrutton, L.J.

(*t*) *Manton v. Brocklebank*, [1923] 2 K. B. p. 226, *per* Warrington, L.J. See also Williams, *Animals*, pp. 286-92; Williams in 56 L. Q. R. pp. 358-9.

(*u*) *Vide infra*, s. 146 (7). In *Tallents v. Bell*, [1944] 2 A. E. R. 474, it was held by the Court of Appeal that all dogs fall into one category. If a lurcher or a beagle injures a rabbit, there is no liability because such dogs are specially addicted to hunting. The *scienter* must be established as regards the particular dog. But it is submitted that a dog can never involve his owner in liability for attacking a rabbit, any more than a cat for attacking pigeons, since it is the natural propensity of dogs so to do.

(*w*) The Court takes judicial notice of the fact that the kind of animal is dangerous or harmless as the case may be: *M'Quaker v. Goddard*, [1940] 1 K. B.

competent to the Courts to reconsider the classification of former times and to include domestic animals of blameless antecedents in the class of dangerous animals even when wandering on the road-sides" (x). Thus it is a rule of law, and not a mere proposition of fact, that it is not natural for a dog to bite mankind. "The law", says Lord Holt (y), "takes notice that a dog is not of a fierce nature, but rather the contrary." So it has been decided that it is not natural for a horse to kick a human being (z). So though it is in the nature of an elephant to attack human beings (a), it is not natural for a bull (b) or a camel (c) to do so. The doctrine of *scienter* does not apply unless the animal has done an act. So where a sow was lying on the grass by the side of a road and by getting up on hearing a motor horn caused a horse to shy, it was held that the owner of the sow was not liable for the damage caused. In order to make him liable it would have been necessary to show that the sow did some act beyond merely being where it was (d).

5. *The Dogs Acts*.—At common law it was deemed not to be in the nature of a dog to attack sheep or cattle, and in such cases proof of the *scienter* was accordingly required. On this point, however, the law has been altered by the Dogs Act, 1906, by which it is provided that "the owner of a dog shall be liable in damages for injury done to any cattle by that dog, and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner" (e). The word "cattle" in this statute includes horses, mules, asses, sheep, goats and

at pp. 700-1, *per* Clauson, L.J. It seems inconsistent with this that Scott, L.J., should (*S. C.* at p. 696) have left open the possibility of a general propensity to bite in all camels being established on different evidence in some future case.

(x) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. p. 383, *per* Neville, J.

(y) *Mason v. Keeling* (1699), 12 Mod. p. 335.

(z) *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 490; *Bradley v. Wallaces, Ltd.*, [1913] 3 K. B. 629; *Jones v. Lee* (1912), 106 L. T. 123.

(a) *Filburn v. People's Palace Co.* (1890), 25 Q. B. D. 258.

(b) *Hudson v. Roberts* (1851), 6 Ex. 697.

(c) *M'Quaker v. Goddard*, [1940] 1 K. B. 687. See Williams' article on this case in 56 L. Q. R. 354. Perhaps the decision would have been otherwise if the Court had directed its attention rather to the harmlessness of the camel than to its domesticity. *Vide supra*, s. 146 (1), n. (d).

(d) *Higgins v. Searle* (1909), 100 L. T. 280. (Criticised in Williams, *Animals*, pp. 384-5.) *Cp. Heath's Garage v. Hodges*, [1916] 2 K. B. 370. See Charlesworth, pp. 104-9.

(e) S. 1 (1). A similar provision was contained in an earlier Act, Dogs Act, 1866.

swine (f), and the Dogs (Amendment) Act, 1928 (g), added poultry. Liability for all other kinds of mischief done by dogs stands as at common law.

6. *Evidence of the scienter.*—In proving the *scienter* it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm complained of; it is enough that it has sufficiently manifested a tendency to do such harm, and that the defendant was aware of the fact (h). But in order to prove the *scienter* it is necessary to prove knowledge that the animal is prone to do or has done the particular kind of damage complained of. If a horse bites a man the *scienter* is not established by proving that the horse was known to bite other horses. There is no rule that if he knows that an animal is dangerous in any one respect, the owner is liable if it proves dangerous in another respect (i). In proving the *scienter* the knowledge of any servant who has the custody or care of the animal, or whose duty it is to attend to the matter, is deemed equivalent to the knowledge of his master (k). But a master will not be held liable unless he has ownership or possession and control of the dog. He is not liable for injuries done by his servant's dog (l).

7. *Proof of the scienter not necessary when defendant is liable in contract, trespass, or other cause of action independent of the scienter rule.*—In order to avoid serious confusion of thought, it is necessary carefully to observe that the rule as to the necessity of proving the *scienter* is not a general rule limiting the liability of defendants in all cases in which it is sought to make them liable for injuries caused by animals. It is, on the contrary, merely a special limitation of that particular rule of absolute liability for dangerous animals with which we are now dealing. The rule as to proof of the *scienter* has no application in cases where the plaintiff has some independent cause of action and alleges as consequential damage

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(f) S. 7. But not rabbits kept for commercial purposes: *Tallents v. Bell*, [1944] 2 A. E. R. 474.

(g) S. 1.

(h) *Worth v. Gilling* (1866), L. R. 2 C. P. 1; *Barnes v. Lucille* (1907), 96 L. T. 680.

(i) *Glanville v. Sutton & Co., Ltd.*, [1928] 1 K. B. 571. Cp. *Osborne v. Chocquecl*, [1896] 2 Q. B. 109; *Hartley v. Harriman* (1818), 1 B. & Ad. 620; *Clinton v. J. Lyons & Co.*, [1912] 3 K. B. 198. Contrast *Rose v. Collier, Ltd.*, [1939] W. N. 19. See Williams, *Animals*, pp. 301-2.

(k) *Baldwin v. Casella* (1872), L. R. 7 Ex. 325; *Applebee v. Percy* (1874), L. R. 9 C. P. 647; *Stiles v. Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 311. See (more fully) Winfield, pp. 575-6.

(l) *Knott v. L. C. C.*, [1934] 1 K. B. 126.

some injury done by an animal. In other words, when the plaintiff has no remedy except that which was embodied in the old writ of trespass on the case for keeping a dangerous animal, he must prove the *scienter*; but if he can sue in trespass, or in contract, or on any other independent cause of action, this rule has no application, and liability for consequential damage caused through the instrumentality of an animal is governed by exactly the same principles, as to remoteness of damage and other relevant considerations, as in the case of inanimate agencies of mischief. Thus he who by contract undertakes any duty of care with respect to the person or property of another must show due care to prevent damage by mischievous animals as well as by any other means, and no proof of the *scienter* is needed. For example, in *Smith v. Cook (m)*, the bailee of a horse was held liable on the ground of negligence for damage done to it by a bull without any proof of the *scienter*.

Where, on the other hand, the defendant cannot be made liable in contract, or for trespass, nuisance, negligence or any other of the ordinary heads of liability in tort, but is liable only in respect of his responsibility as the keeper of a dangerous animal, the rule as to proof of the *scienter* becomes operative. For example, as the authorities stand at present, a landowner owes the plaintiff no duty to prevent his sheep, cattle or other domesticated animals from straying from his land into the highway (*n*). If, therefore, they stray there and overturn a motorist or cyclist, he cannot sue the defendant for consequential damage caused by the wrongful obstruction of a highway, in which case the liability of the defendant would be subject only to the ordinary restrictions imposed by the rule as to remoteness of damage. The plaintiff is driven to sue the defendant in his capacity as keeper of the animals, and in such a capacity it is a good defence to him that the mischief was natural to the species (*o*). If the mischief was not natural, and

(m) (1875), 1 Q. B. D. 79. Cp. *White v. Steadman*, [1913] 3 K. B. 340.

(n) *Heath's Garage v. Hodges*, [1916] 2 K. B. 370; *Hughes v. Williams*, [1943] K. B. 574. *Vide infra*, s. 148 (2).

(o) *Heath's Garage v. Hodges*, [1916] 2 K. B. 370; *Deen v. Davies*, [1935] 2 K. B. 282, at pp. 288, 293—4. In *Heath's Garage v. Hodges* the defendant was absolved from liability on two grounds which are at first sight contradictory. He was not liable on the basis of *scienter* because it is a natural characteristic of sheep that they should stray. He was not liable for negligence because it is not natural, i.e., in the ordinary course of things, for sheep when straying to obstruct the traffic on a highway or overturn motor cars, their tendency being rather to avoid such traffic. "Domestic animals of normal character do not by straying on the road obstruct traffic" (per Neville, J., at p. 383). Cp. *Hadwell v. Righton*, [1907] 2 K. B. 345; *Aldham v. United Dairies*, [1940] 1 K. B. p. 514, per du Parcq, L.J. In *Cutler v. United Dairies*, [1933] 2 K. B. pp. 302—3, Scrutton, L.J., doubted whether *scienter* would make the defendant liable for a

*scienter* can be proved, then the defendant will be liable. Again, if the same animals had trespassed, not into the highway, but into the plaintiff's own land, and there had done the same damage, the defendant would have been liable. And if the defendant has himself brought the animal on to the highway he owes a duty to take all reasonable care that the animal does not damage other parties (p).

8. *Special grounds of defence*.—The absolute liability of the keeper of animals may be excluded by certain circumstances of excuse or justification, though it is not easy in the present state of the law to give a definite and exhaustive list of them :—

(a) *Contributory negligence*.—Contributory negligence on the part of the plaintiff is a good defence. He who brings mischief on himself by irritating an animal cannot hold the owner of it liable (q).

(b) *Act of God*.—The escape of an animal from safe custody by the act of God is probably no ground of liability (r).

(c) *Plaintiff a trespasser*.—It is also a good defence that the plaintiff, when injured by the animal, was trespassing upon the defendant's premises where the animal was kept unless it was kept there with the deliberate purpose of injuring him (s). An occupier, as we have seen, owes no duty of care towards a trespasser in respect of the safety of his premises. A farmer is entitled to keep a bull in his field, or a dog in his house, without being liable to a trespasser who enters and is there attacked (t). It is true,

shying horse. "I cannot believe that there is a horse in England which has not shied at something in the course of its life". So Winfield, pp. 570-2, and Miles, in Digest, p. 336. *Contra* Williams, *Animals*, pp. 316-20.

(p) *Deen v. Davies*, [1935] 2 K. B. at pp. 294-5. *Vide infra*, s. 148 (3).

(q) *Filburn v. People's Palace Co.* (1890), 25 Q. B. D. p. 260, *per* Esher, M.R.; *Marlor v. Ball* (1900), 16 T. L. R. 239 (stroking a zebra); *Sycamore v. Ley* (1932), 147 L. T. 342; *Lee v. Walkers* (1939), 162 L. T. 89 (boy of four and a half years disturbing and kissing dog while eating). Contrast *Smith v. Pelah* (1746), 2 Str. 1263, and *Wyatt v. Rosherville Gardens Co.* (1886), 2 T. L. R. 282. For discussion of cases see Williams, *Animals*, pp. 331-2.

(r) In *Nichols v. Marsland* (1875), L. R. 10 Ex. p. 260, Bramwell, B., expressed doubts upon this point. "If a man kept a tiger, and lightning broke its chain and it got loose and did mischief, I am by no means sure that the man would not be liable." The tiger would in fact presumably be dead! But, however that may be, there is no other authority for making such a distinction, in itself unreasonable, between liability for dangerous animals and liability under the rule in *Rylands v. Fletcher*. See, however, Williams, *Animals*, p. 336. As to the meaning of the term "act of God", see s. 142, *supra*.

(s) *Sarch v. Blackburn* (1890), 4 C. & P. 297; *supra*, s. 132. See also Williams, *Animals*, pp. 349-52.

(t) *Supra*, s. 132 (2).

indeed, that in *Grange v. Silcock* (u) the owner of a dog was held liable for the act of his dog in worrying the plaintiff's sheep, although they were trespassing on the defendant's land, but this case turned upon the unqualified provision of the Dogs Act, 1865, that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog" (w). Even if this very literal interpretation of the Act, as excluding all common-law justifications, is correct, the same principle is not applicable to cases in which the defendant is sued at common law.

It would not appear to be a good defence in any case that the plaintiff was trespassing upon land other than that of the defendant.

(d) *Volenti non fit injuria*.—The maxim *Volenti non fit injuria* must be deemed no less applicable to dangerous animals than to other dangerous things of which the plaintiff has agreed to run the risk (x). Presumably he who keeps a dangerous animal on his premises owes no other duty to a bare licensee who enters on those premises than to warn him of the danger; if after such warning the licensee chooses to run the risk, he cannot hold the occupier liable (y).

(e) *Act of third person*.—How far, if at all, it is a good defence that the immediate cause of the damage complained of was the unlawful act of a third person in letting the animal loose or inciting it to mischief cannot be regarded as being definitely decided. In *Baker v. Snell* (z) the question was much discussed by a Divisional Court and by the Court of Appeal, but there was such a conflict of judicial opinion that it is difficult to determine what the case decided or to regard it as authority. On principle it would seem that the law is the same as in cases falling under the rule in *Rylands v. Fletcher* (a), in which case the answer to the question depends on the following distinction: since the keeping of a dangerous animal, even though a wild beast, is not in itself a

(u) (1897), 77 L. T. 340.

(w) The Dogs Act, 1906, is to the same effect.

(x) *Supra*, s. 8. *Sarch v. Blackburn* (1830), 4 C. & P. 297; *Manton v. Brocklebank*, [1923] 2 K. B. 212.

(y) *Supra*, s. 130. Glanville Williams suggests in 56 L. Q. R. p. 360, that a visitor to a zoo by his mere fact of going there voluntarily assumes the risk of an inevitable accident. As to the defence of common employment in these cases, *vide supra*, s. 28 (8).

(z) [1908] 2 K. B. 352, 825. See this case more fully analysed in 9th ed., p. 562, n. (d), and for a remarkably outspoken criticism, see an article by Beven, 22 H. L. R. 465, *Harvard Essays*, 572. See also the discussion of the same matter by Sir F. Pollock in 25 L. Q. R. 317; Williams, *Animals*, p. 335.

(a) *Vide supra*, s. 141.

wrongful act, he who takes all reasonable care to prevent it from doing mischief should not be responsible for the wrongful act of a stranger (b) in letting it loose, or inciting it to evil deeds; just as he who with due care keeps on his land a reservoir of water or any other dangerous inanimate thing is not liable if its escape is caused by the wrongful act of a stranger. Therefore, if I keep a tiger shut up in a cage or a fierce dog tied up by a chain, I should be held free from liability although a trespasser opens the cage or unlooses the chain (c). But if, on the other hand, I keep a dangerous animal without taking reasonable care to prevent it from doing harm I am guilty of an act which is itself wrongful, and I am liable for the consequences, even though the immediate cause of the harm was the intervening wrongful act of a third person. Therefore, if I, knowing my dog to be accustomed to bite mankind, allow it to run at large, I shall pay for its bites, even though the immediate opportunity or inducement to the mischievous act was afforded by a stranger.

9. *Who is liable for animals.*—Although it is usual and convenient to speak of the liability of the owner of an animal, liability does not primarily depend on ownership. It depends on possession. He who keeps an animal is responsible for its acts, whether he is the owner of it or not (d). Whether the owner ceases to be responsible if he has entrusted the control to somebody else is an open

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(b) As to who is a "stranger", *vide infra*, s. 141 (2).

(c) So held in the House of Lords in the Scotch case of *Fleeming v. Orr* (1855), 2 Macq. 14. In *Baker v. Snell*, [1908] 2 K. B. 352, 825, a publican kept on his premises a dog known by him to be savage. The dog was habitually kept chained up, but it was the duty of one of the defendant's servants, the potman, to take the animal for a run in the early morning and to chain it up again. One morning, in breach of his duty, he took the dog into the kitchen, and by way of a practical joke incited it to attack one of the housemaids. The dog having too readily responded to the invitation, the housemaid sued her employer for the injury so suffered by her. Sutton, J., in the Divisional Court, and Cozens-Hardy, M.R., and Farwell, L.J., in the Court of Appeal, held the defendant liable on the ground that he who keeps a dangerous animal is absolutely liable for its misdeeds, even though the direct cause of the mischief is the independent wrongful act of a third person. But Channell, J., and Kennedy, L.J., refused to accept this wide extension of the responsibility of the keeper of animals. "I cannot agree", said the former learned Judge, [1908] 2 K. B., at p. 354, "that the liability covers the unauthorised and wilful act of a third person. For instance, if a thief had got into the defendant's yard and been followed there by a policeman, and the thief, happening to know the dog's name, had set it on to the policeman, it could not be contended that the defendant would be liable." Yet if the views of Sutton, J., Cozens-Hardy, M.R., and Farwell, L.J., are correct, the keeper of a watch-dog would be liable in such a case. It is submitted that notwithstanding this case the question still remains open, and the opinions expressed on the point by Channell, J., and Kennedy, L.J., are entitled to prevail.

(d) *McKone v. Wood* (1891), 5 C. & P. 1. As to the liability of an occupier for animals naturally upon his land, see s. 138, *supra*.



question. Lord Wright has said (e) that a transfer of actual possession and control does not necessarily terminate the owner's responsibility, and in another case (f) Atkin, L.J., put the rhetorical question: "Can the person who has acquired a tiger, so long as he remains its owner, relieve himself of responsibility by contracting with a third person for its custody?" But it would be surprising if it were held that a man who deposited his monkey in a zoo continued to be liable for its mischief, and it has been suggested (g) that in the case of an animal *mansuetae naturae* known to be dangerous liability continues, until the transferee, being a competent person, becomes aware of the vicious propensity. The occupier of the premises on which the animal is kept is not responsible for it unless he is also the keeper of it, even if it is kept there with his permission and with his knowledge of its dangerous character. The material question is: Who had the control of the animal? (h). But this rule would not, it is submitted, exempt an occupier from liability based on some other principle than that of absolute responsibility for the acts of animals. Every occupier, for example, is in general bound to use due care for the safety of persons lawfully entering upon his premises, and not the less so because the source of danger on those premises is the presence of a dangerous animal. In *Knott v. L.C.C.* (i), it is true, the defendants were held not liable to compensate a cleaner employed at one of their schools who was bitten by a dog belonging to the keeper of the school, known by the keeper to be dangerous. But in that case the defendants had no knowledge of the mischievous propensities of the dog or even of the fact that the dog was kept on the premises.

*Dogs Acts.*—In the case of mischief done by dogs to cattle and poultry, it is provided by the Dogs Acts, 1906 and 1928, that the

(e) *Brackenborough v. Spalding U. D. C.*, [1942] A. C. p. 324.

(f) *Belvedere Fish Guano Co. v. Rainham Chemical Works*, [1920] 2 K. B. p. 504. Lords Buckmaster and Parmoor in *Rainham Chemical Works v. Belvedere Co.*, [1921] 2 A. C. pp. 477, 491, would apparently have given an affirmative answer to the question. In *Pinn v. Rew* (1915), 32 T. L. R. 451, the defendant who had entrusted the control of his cow to a drover who was an independent contractor was held liable for the mischief it did, but that was a case of doing a dangerous thing on a highway, a class of case in which according to general rules (*vide supra*, s. 31 (4)) an employer is held responsible for independent contractors. In India it has been held that the owner remains liable for damage done by an elephant used for processional purposes in a temple: *Vedapuratti v. Kappan Nair*, [1912] 1 L. R. 35 Mad. 708.

(g) See Williams, *Animals*, p. 326.

(h) *North v. Wood*, [1914] 1 K. B. 629; *Knott v. L. C. C.*, [1934] 1 K. B. 126. The rule had been doubted in the Divisional Court.

(i) [1934] 1 K. B. 126.

owner of a dog shall be liable for it. The earlier Act provides, however, that in the case of such an injury "the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at that time" (k).

10. *Duration of liability*.—How long does a person remain responsible for an animal which was once in his possession but has escaped from it? This has never been decided (l). Probably, however, a distinction must be drawn between animals which are and those which are not commonly found in a state of natural liberty in the district in which the mischief is done. In the former case the responsibility of the keeper presumably ceases as soon as the animal has recovered, *sine animo revertendi*, that condition of natural liberty from which it was taken. It may be assumed that he who lets a rat out of a trap or releases a captive fox is not responsible for its future actions. "If one hath kept a tame fox which gets loose and grows wild, he that hath kept him shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature" (m). If, on the other hand, the animal (n) is not of a kind which is found in a state of natural liberty, the true rule would seem to be that "the owner's liability continues until some other person has assumed the *dominium* of the animal, and has also become aware of its dangerous propensities, at which point the liability for future accidents will be transferred to the new *dominus*" (o). So in another connection Scrutton, L.J., said (p): "A common law liability for negligence cannot be wiped out by abandoning that which has caused the damage." If a tiger escapes from a menagerie, its former possessor will answer for all the harm that it does until it is recaptured.

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(k) Dogs Act, 1906, s. 1. It is not clear what these provisions really mean. If the occupier of the premises fulfils this burden of proof, who is liable for the dog? Is the owner, as such, liable at all, or does the term owner mean keeper? Is the keeper liable if he is neither the owner of the dog nor the occupier of the premises? Is the owner of the dog liable if he is no longer in possession of it, as when it has been stolen?

(l) For the many difficult questions that might arise, see Williams, *Animals*, pp. 336-9.

(m) *Mitchil v. Alestree* (1676), 1 Vent. 295. This *dictum* is criticised by Holmes, *Common Law*, p. 22. In *Brady v. Warren*, [1900] 2 Ir. R. 632, the defendant was held liable for the acts of his deer which had escaped from his park six years before and had wandered wild ever since.

(n) Whether *feræ naturæ* or *mansuetæ naturæ* and known to be dangerous.

(o) Cl. & L., 8th ed., pp. 407-8 (omitted from 9th ed.). Cp. Charlesworth, pp. 102-3. For another proposed test, see Miles in Digest, p. 338.

(p) *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. p. 166.

The ordinary rules as to remoteness of damage apply in cases of liability for dangerous animals (q).

### § 147. Cattle-Trespass

1. *Absolute liability for land-trespass of cattle.*—We now pass to the second branch of the law relating to liability for harm done by animals, the law of land-trespass. Cattle-trespass is one of the oldest grounds of liability in English law (r). “If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. . . . For instance, if a man’s cattle, or sheep, or poultry, stray into his neighbour’s land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences” (s). In such cases the owner is absolutely liable for the damage caused by the trespass if the damage is not too remote (t). The propensity of the animal to do the particular kind of damage which is in fact done is relevant as connecting the injury with the trespass, and so preventing the damages from being too remote (u). This must be carefully distinguished from the doctrine of the *scienter* in the case of dangerous animals. Thus in *Theyer v. Purnell* (w) the defendant’s sheep, being infected with scab, trespassed upon the plaintiff’s land and were there interned by an act of executive authority and infected the plaintiff’s sheep, and it was

(q) See Winfield, pp. 577–8.

(r) Starting with a case in 1353 : 27 Lib. Ass. pl. 56 (Fitz. Trespas 197; Bro. Trespas 249). See Williams, *Animals*, pp. 127–35, and also Holdsworth, *H. E. L.* viii. 470–1, Bohlen, *Studies*, pp. 354–360.

(s) *Cox v. Burbidge* (1863), 13 C. B. (n.s.) 430, p. 438, *per* Williams, J. Cp. *Rylands v. Fletcher* (1866), L. R. 1 Ex. p. 280, *per* Blackburn, J.; *Symons v. Southern Ry.* (1935), 153 L. T. p. 101, *per* Lord Hanworth.

(t) See *Manton v. Brocklebank*, [1923] 2 K. B. 212; *Bradley v. Wallaces, Ltd.*, [1918] 3 K. B. 629.

(u) *Manton v. Brocklebank*, [1923] 2 K. B. p. 227, *per* Warrington, L.J. This is inconsistent with the application of the rule in *Re Polemis*, [1921] 3 K. B. 560; see Pollock, p. 37. It has even been suggested that *Cox v. Burbidge*, *supra*, has been overruled by that case, but in *Cox v. Burbidge*, where a five year old boy was kicked by a horse straying on a highway, it was held that there was no negligence and no cattle-trespass as against the plaintiff, and anything which may be found in the judgments contrary to *Re Polemis* is therefore *obiter*. If *Re Polemis* is good law (*vide supra*, s. 34 (7), n. (p)), liability in cattle-trespass may be an exception to the rule there laid down. See Williams, *Animals*, pp. 157–73. But *vide supra*, s. 34 (16), n. (i), for another possibility.

(w) [1918] 2 K. B. 333. See Williams, *Animals*, pp. 167–8.

held that the defendant was liable for the resulting damage without any proof of the *scienter*, for the damage was not too remote. "Every owner of sheep must be aware that his sheep are liable to develop scab." It is instructive to compare with this case the earlier decision in *Cooke v. Wareing* (x), where the facts were identical but the plaintiff was non-suited. The reason was, however, that he sued not in trespass, as he might have done, for the entrance of the sheep upon his land, but in trespass on the case for keeping dangerous animals, and therefore took upon himself the needless burden of proving the *scienter*. It is clear therefore that whereas in an action of case for harm done by a dangerous animal, if the animal be *mansuetæ naturæ*, the plaintiff must prove that the defendant had knowledge of the mischievous propensities of the particular animal, in an action of land-trespass it is sufficient to show that animals of that kind as a class have such mischievous propensities. Two cases clearly illustrate the distinction. In *Ellis v. Loftus Iron Co.* (y) the defendant's stallion obtruded its head and feet over the plaintiff's fence, which was a technical trespass, and bit and kicked the plaintiff's mare. The defendant was held liable for the mare's injuries; the damage was not too remote. But in *Manton v. Brocklebank* (z), where a mare and a horse were lawfully in the same field and there was no trespass, and the mare kicked the horse so that it had to be destroyed, the owner of the mare was not liable for the injury done to the horse in the absence of the *scienter*. The owner of an animal *mansuetæ naturæ* is not responsible for any of the natural propensities of its class (other than trespass to land), even though they may be likely to result in damage (a).

2. *No liability for land-trespass of cats or dogs.*—A man is not however liable for the trespasses of all animals *mansuetæ naturæ*. It is well settled that he is not liable for the trespass of his dog (b). Any trespass by a horse or an ox must cause some damage, even when the animal is wandering about and eating what attracts it; trespass by a dog in ordinary circumstances is not likely to do

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(x) (1863), 2. H. & C. 332. See Williams, *Animals*, pp. 341-2.

(y) (1874), L. R. 10 C. P. 10; cp. *Lee v. Riley* (1865), 18 C. B. (N.S.) 722 (mare kicking horse).

(z) [1923] 2 K. B. 212.

(a) *S. C.* p. 230, per Atkin, L.J.; *Buckle v. Holmes*, [1926] 2 K. B. p. 130, per Atkin, L.J.

(b) *Mason v. Keeling* (1699), 12 Mod. 335, per Holt, C.J.; *Cox v. Burbidge* (1863), 13 C. B. (N.S.) p. 440, per Willes, J.; *Toogood v. Wright*, [1940] 2 A. E. R. p. 308, per Slesser, L.J.

substantial damage. Further, dogs cannot always be kept shut up (c). Yet it is not (as Goddard, L.J., has pointed out (d)) an altogether satisfactory state of the law that if a cow strays on to the land of the neighbour of its owner and eats a couple of cabbages, the owner is liable in trespass; but if his dog escapes into his neighbour's house and wrecks a room, he is not liable. The Court of Appeal has moreover held in *Buckle v. Holmes* (e) that a cat is in the same privileged position as a dog. The owner of a trespassing cat which eats his neighbour's pigeons is not liable. It seems possible for the Courts to make yet further additions to this class (f).

3. *Special grounds of defence.*—The special defences open to a defendant in an action for cattle-trespass have not received much consideration from the Courts, but a few cases have arisen.

(a) *Plaintiff's own default.*—It is no defence that the plaintiff was under a duty under covenant with his landlord to keep the fence through which the cattle strayed in repair: such an obligation is *res inter alios acta* (g). But it is otherwise if the plaintiff's duty to keep the fences in repair is imposed by law (h) or prescription (i).

(b) *Volenti non fit injuria.*—The doctrine of *volenti non fit injuria* exempts from liability in the case of animals straying from the highway. In such cases negligence must be proved. An ox may stray from a highway into an ironmonger's shop without imposing liability upon its owner (k).

(c) *Act of third person.*—It is uncertain what is the position if the damage is due to the unlawful act of a third party. In 1480 Brian, C.J., held (l) that it was no defence that the cattle were chased on to the plaintiff's land by the dogs of a third party, but

(c) *Buckle v. Holmes*, [1926] 2 K. B. p. 129, *per* Bankes, L.J. See, however, Fifoot's historical explanation of the rule: Background, p. 250.

(d) *Hughes v. Williams*, [1943] K. B. p. 580. But of course he *may* be liable for negligence, *infra*, s. 148 (1).

(e) [1926] 2 K. B. 125.

(f) See, however, Williams, *Animals*, p. 146, and on dogs and cats, *ibid.*, pp. 137-47. As to deer, see Williams, *loc cit.*, p. 147; and *Brady v. Warren*, [1900] 2 T. R. 692.

(g) *Holgate v. Bleazard*, [1917] 1 K. B. 443; *Park v. Jobson*, [1945] 1 A. E. R. 222.

(h) *Singleton v. Williamson* (1861), 7 H. & N. 410.

(i) (1441), Y. B. 19 Hen. VI, 33, pl. 68. On the duty to fence see Williams, *Animals*, pp. 203-26, and see Holdsworth in 55 L. Q. R. p. 591.

(k) *Supra*, s. 8 (2). See authorities there cited. Charlesworth (pp. 110-3) considers this rule to be due to a misreading of the Year Book authorities. See also *Wellaway v. Courtier*, [1918] 1 K. B. 200, and the criticism of that case in Williams, *Animals*, pp. 180-1. See also *Park v. Jobson*, [1945] 1 A. E. R. 222.

(l) Y. B. 20 Edw. IV, 11, pl. 10.

in Ireland the defendant succeeded where he showed that the trespass of his cattle was due to the negligent act of a third party in using a right of way (*m*). This decision seems consistent with the general tendency of modern law.

(d) *Act of God and inevitable accident*.—It would seem that act of God affords a good defence as it does under the analogous rule of *Rylands v. Fletcher* (*n*). On the other hand the weight of authority is against the admission of other forms of inevitable accident as a defence (*o*), except (as in other actions of trespass) where the trespass is involuntary, *i.e.*, where the defendant has lost control of the animal (*p*). It is possible that the exemption from liability of the owner of cattle which escape from the highway on to adjoining land without negligence on his part is an instance of inevitable accident providing a good defence, but this is better regarded as an application of the maxim *Volenti non fit injuria* (*q*).

4. *Nature of liability for animals*.—When Blackburn, J., formulated the rule in *Rylands v. Fletcher* (*r*) he founded his principle upon both the old action of cattle-trespass and the rule governing the keeping of dangerous animals with knowledge of their propensities. But the provenance of the two rules is distinct. Cattle-trespass was from the earliest times remedied by the action of trespass, whilst the rule as to dangerous animals is an application of the action of trespass on the case. Although the liability under the latter rule is often spoken of as absolute (*s*), the rule is substantially a branch of the law of negligence (*ss*), for liability always depends upon the *scienter*, though in the case of animals *feræ naturæ* proof of the *scienter* is dispensed with (*t*), and the *scienter* is at least

(*m*) *McGibbon v. McCurry* (1909), 43 Ir. L. T. 132. See Williams, *Animals*, pp. 181-5.

(*n*) *Vide, supra*, s. 142. See Williams, *Animals*, pp. 184-5.

(*o*) *Cox v. Burbridge* (1863), 13 C. B. (N.S.) p. 438, *per* Williams, J.; *Fletcher v. Rylands* (1866), L. R. 1 Ex. p. 280, *per* Blackburn, J.; *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

(*p*) *Mitten v. Faudrye* (1626), Popham, p. 162, *per* Dodderidge, J. See Gold in 21 Bell Yard, pp. 29-31. Williams, *Animals*, pp. 185-94, thinks that inevitable accident has been held a good defence where any other course would have unreasonably hampered the defendant in the exercise of his rights.

(*q*) *Supra*, s. 8 (2).

(*r*) *Supra*, Chap. XVII.

(*s*) So in *Knott v. L. C. C.* [1934] 1 K. B. p. 138, Lord Wright called it "strict or absolute"; in *McQuaker v. Goddard*, [1940] 1 K. B. p. 696, Scott, L.J., called it "absolute".

(*ss*) *Cp. du Parcq, L.J.*, in *Read v. Lyons & Co.* (1944), 61 T. L. R. p. 166.

(*t*) *Supra*, s. 146 (3). *Cp. Iyer*, pp. 262-4.

“potent evidence” of negligence (*u*). Since the rule in *Rylands v. Fletcher* was established the rule as to dangerous animals has been regarded by a great preponderance of authority as one branch of it (*w*) whilst cattle-trespass has been treated as an illustration of it (*x*). But though both cattle-trespass and liability for animals *feræ naturæ* have been brought by the Courts into relation with the same general principle of liability laid down by Blackburn, J., the older rules are not merged in it—there are differences between the three rules (*y*), and in particular it is essential to insist upon the vital distinction between trespass and trespass upon the case (*z*).

### § 148. Liability for Animals: Negligence and Nuisance

1. *Liability for negligence*.—Though there is no strict liability for animals *mansuetæ naturæ* except in cases of land-trespass or where the *scienter* has been proved, a man may be liable for negligence in the keeping of them (*a*) and for nuisance. “Quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence” (*b*). In an action founded upon the breach of such a duty the ordinary rules in an action of negligence apply, and the defendant may escape liability either because he was under no duty to take care or because the damage was too remote.

2. The plaintiff must first establish a duty owed to him by the defendant to take care. So in *Brackenborough v. Spalding U.D.C.* (*c*) it was held that the proprietors of a market owe no duty

(*u*) Cp. Williams, *Animals*, p. 363. *du Parcq, L.J.*, in *Read v. Lyons & Co.*, *supra*, said it raised an “irrebuttable presumption of negligence”.

(*w*) See authorities collected by Stallybrass in 3 *Camb. L. J.* p. 384, and by Williams, *Animals*, p. 352, n. (4). Cp. Lord Wright in *Knott v. L. C. C.*, [1934] 1 *K. B.* p. 139.

(*x*) *Holgate v. Bleazard*, [1917] 1 *K. B.* 443.

(*y*) See Williams, *Animals*, pp. 197–9, 352–3; Winfield, p. 569; *Read v. Lyons & Co.* (1944), 61 *T. L. R.* p. 156. *per du Parcq, L.J.*

(*z*) *Supra*, s. 147 (1).

(*a*) *Pinn v. Rew* (1916), 32 *T. L. R.* 45; *Turner v. Coates*, [1917] 1 *K. B.* 670. It is submitted that these cases are still good law, though a *dictum* of Atkin, L.J., in *Manton v. Brocklebank*, p. 230, would seem to limit the owner's liability to cases in which he has intentionally caused the act complained of. See also *Hines v. Tousley* (1926), 135 *L. T.* 296; *Pitcher v. Martin*, [1937] 3 *A. E. R.* 918.

(*b*) *Pardon v. Harcourt-Rivington* (1932), 146 *L. T.* p. 392, *per Lord Atkin*. Cp. *Sycamore v. Ley* (1932), 147 *L. T.* p. 345, *per Greer, L.J.*

(*c*) [1942] *A. C.* 810.

to persons using the market, still less to members of the public using the highway, to provide pens which will make it impossible for animals sent there to escape. As we have seen (*d*) it is a question of law whether in any particular circumstances a duty of care exists, and decisions of the Courts have grafted on to the law certain exceptions to the general principle for determining this question laid down by Lord Atkin in *Donoghue v. Stevenson* (*e*).

*No duty to prevent cattle straying on highway.*—One of these exceptions is found in the law relating to liability for negligence in the keeping of animals. It was laid down in *Heath's Garage v. Hodges* (*f*) that, though it is a criminal offence under the Highways Act, 1864, there is no duty owed by the owner or occupier of land adjoining the highway to persons using the highway to prevent harmless animals from escaping on to it. So in that case the defendant was not liable when owing to a defective hedge one of his sheep escaped on to the highway and there ran into the plaintiff's motor car. The rule has been explained (*g*) as arising from the fact that in early days the majority of roads had in fact no hedges at the side of them, but Lord Wright has said that it is modern (*h*). It has been much criticised. "A farmer", says Lord Greene, M.R. (*i*), "who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes a few cauliflowers, is liable in damages to his neighbour, but if, through a similar gap in the hedge, it strays on to the road and causes the overturning of a motor omnibus, with death or injury to thirty or forty people, he is under no liability at all." The Court of Appeal have invited the House of Lords, if the opportunity arises, or, if it does not, the Legislature to over-rule it (*k*). But for the time being it remains law (*l*).

(*d*) *Supra*, s. 120 (3).

(*e*) [1932] A. C. 562; *supra*, s. 120 (3).

(*f*) [1916] 2 K. B. 370.

(*g*) *Deen v. Davies*, [1935] 2 K. B. p. 288, *per* Slessor, L.J. *Cp.* *Romer, L.J.*, at p. 296.

(*h*) *Brackenborough v. Spalding U. D. C.*, [1942] A. C. p. 321.

(*i*) *Hughes v. Williams*, [1943] K. B. p. 576. But in the case of the motor omnibus he may be liable to a penalty under the Highway Act. For other criticisms see *Williams, Animals*, pp. 391-2; *Winfield*, pp. 554-5. The learned County Court Judge, F. R. Y. Radcliffe, who was reversed in *Heath's Garage v. Hodges*, once told me that when he died I should find the name of the case engraved upon his heart!

(*k*) By Lord Greene, M.R., and MacKinnon and Goddard, L.JJ., in *Hughes v. Williams*, [1943] K. B. 574.

(*l*) In *Brackenborough's Case* (*ubi supra*), Lord Russell (at p. 318) accepted it, but Lords Simon, L.C. (p. 316), Wright (p. 321), and Porter (p. 329), left its correctness open for future consideration in the House of Lords.



3. *Exceptions to this rule.*—Lord Wright has said (m) that the limits of the rule in *Heath's Garage v. Hodges* are still uncertain. One limitation is clear: the rule only applies to harmless animals. "You only detain a dangerous thing in a particular place at your peril, and you cannot take advantage of the privilege of not being bound to fence or hedge your property" (n). But the practical value of this limitation is severely limited by the rule that an animal *mansuetæ naturæ* is not regarded as dangerous if it acts in accordance with its nature (o). Another possible limitation is that a man who has a gate may be under a duty to keep it shut; but if that be the case it would only add to the illogicality of the law, by putting the man with no fence or hedge in a better position than the man who has one but has left his gate open (p). It has also been suggested that the rule in *Heath's Garage v. Hodges* does not apply to the escape of animals in such numbers as to cause an obstruction (q), but if this be the case it would seem to be an instance of liability for nuisance rather than negligence. Finally, in *Deen v. Davies* (r) the defendant who had insecurely tethered his pony in an open stable whilst he was on business in Merthyr Tydfil was held liable when the pony escaped and trotting home-wards caused the plaintiff to fall down. He owed a duty to the public to show reasonable care in tethering his animal. It is not clear what is to be regarded as the true ground of this decision. It is *prima facie* evidence of negligence to leave a horse unattended in a public street, and if it bolts and does damage its owner, in the absence of explanation, will be held liable (s). Romer, L.J., and Singleton, J., thought that a duty of care exists as much when a horse is kept in a place adjoining a highway as when it is left on the highway itself. On the other hand Slessor, L.J., seems to have based his decision on the difference between town and country (t).

(m) *Brackenborough v. Spalding U. D. C.*, [1942] A. C. p. 321.

(n) *Deen v. Davies*, [1935] 2 K. B. p. 288, *per* Slessor, L.J.

(o) *Vide supra*, s. 146 (3) and (6).

(p) *Ellis v. Banyard* (1911), 106 L. T. p. 52, *per* Vaughan Williams, L.J. (obiter); *Hughes v. Williams*, [1943] K. B. pp. 578, 579.

(q) Vaughan Williams, L.J., *ubi supra*. It was so held in Ireland by Molony, C.J., in *Cunningham v. Whelan* (1917), 52 Ir. L. T. 67 (criticised in Williams, *Animals*, p. 390).

(r) [1935] 2 K. B. 282.

(s) *Gayler and Pope v. Davies*, [1924] 2 K. B. 75. See also ninth edition, s. 123 (5). On the other hand it has been held that it is not even *prima facie* evidence of negligence to show that a man has been driving sheep along a highway at night without a light: *Catchpole v. Minster* (1913), 109 L. T. 953 (doubted in Williams, *Animals*, p. 378); still less that he has left his dog unattended in a motor car in a parking place: *Fardon v. Harcourt-Rivington* (1932), 146 L. T. 342.

(t) The other two members of the Court also adverted to this distinction which is treated by Goodhart, 52 L. Q. R. p. 9, as the true *ratio decidendi*.

It is submitted that the true explanation of this decision lies in the fact that the immunity from the duty to fence is in reality a branch of the law relating to the duties of occupiers. The immunity does not extend to protect those who place their cattle on the land of others. They will be liable if the animals escape owing to negligence and cause damage on the highway (*u*). It has been suggested also (*w*) that if a man deliberately takes his cattle on to a highway he may be liable, but it is submitted that this is so only if he has been guilty of some further negligence (*x*).

Though the law as it stands is unsatisfactory the complete abolition of the rule in *Heath's Garage v. Hodges* (*y*) would create new grounds for dissatisfaction. There are vast tracts of unfenced moorland which afford grazing for countless sheep in Scotland and the North of England. It would work great hardship if in future they were to depasture at their owner's peril. It would seem that in any reform of the law (if reform there is to be) some consideration should be given to the characteristics, and possibly the custom, of the neighbourhood (*z*).

4. *Remoteness of damage*.—In actions for negligence in keeping animals the ordinary rules as to remoteness of damage apply. The damage must be the direct consequence of the negligence (*a*). In *Aldham v. United Dairies, Ltd.* (*b*) *Greene, M.R.*, and *du Parc, L.J.*, equated the spontaneous action of an animal to the *nexus actus* of a human being (*c*). So that even if a man has been negligent, *e.g.*, in leaving a horse unattended, he will not be liable for any damage due to any violent departure from its ordinary docility, but if he knew that the horse was restive he will be liable for all damage attributable to its restlessness, for that is the direct consequence of his negligence. And, of course, the likelihood of the animal causing damage (whether relevant to remoteness of damage

(*u*) If this be right the opinion expressed by Slesser, L.J. (in *Deen v. Davies*, [1935] 2 K. B. p. 288) that the immunity extends to protect a licensee on the land is probably wrong.

(*w*) By Goddard, L.J., in *Hughes v. Williams*, [1943] K. B. p. 579.

(*x*) See, *e.g.*, *Tillett v. Ward* (1882), 10 Q. B. D. 17; *supra*, s. 8 (2).

(*y*) As suggested by Goodhart in 52 L. Q. R. p. 10; Glanville Williams, 7 Mod. L. R. 77.

(*z*) Cf. the ponies in the New Forest. For some suggestions as to the best way of dealing with this difficult problem see Williams, *Animals*, p. 392; Winfield, p. 555.

(*a*) Some undecided problems in this connection are suggested in *Brackenborough v. Spalding U. D. C.*, [1942] A. C. at pp. 316, 321, 331.

(*b*) [1940] 1 K. B. 507.

(*c*) At pp. 510-1, 513-4. *Vide supra*, s. 34 (21 *sqq.*).

or not) is clearly relevant to determine the existence of negligence (d).

5. *Liability for nuisance*.—Actions for nuisance caused by animals do not require lengthy consideration (e). Logically cattle-trespass should have fallen under this head (f). Further, it might well have been held that obstruction of a highway by an animal was a nuisance, but the cases, as we have seen (g), have almost all been decided on the basis of negligence. But it has been held (h) that a dog with a long loose lead running about by itself in the streets of London is a nuisance, and if it be law that a man is liable for animals escaping to a highway in such numbers as to amount to an obstruction (i) that also may be liability in nuisance. It is necessary, however, to rely upon nuisance where there is no escape or no negligence or where the animal is not dangerous. So the stench of pigs (k) and the crowing of cockerels (l) have been held to constitute a nuisance. It remains to consider how far a man may be liable in nuisance for damage of a non-dangerous character done by animals of an undomesticated class. In general, there is no liability for the escape of noxious animals naturally on the defendant's land, such as rats, rabbits, or birds (m). But if for the purposes of sport or otherwise, a man purposely accumulates rabbits or game upon his land, he is probably liable for all damage done by them to neighbouring proprietors (n). So if he

(d) On this ground it was held that there was no negligence in *Lathall v. Joyce & Son*, [1939] 3 A. E. R. 854 (bullock attacking a man), and *Toogood v. Wright*, [1940] 2 A. E. R. 306 (racing greyhound biting woman rescuing a cat). The latter case is criticised by Williams in 56 L. Q. R. 358, n. (11).

(e) There is an elaborate discussion of this subject by Glanville Williams in his *Liability for Animals*, pp. 235-62, and this section owes much to his researches.

(f) *Vide supra*, s. 47 (6) n. (t).

(g) *Vide supra*, s. 148 (3).

(h) *Pitcher v. Martin*, [1937] 3 A. E. R. 918. Possibly some such idea is behind the reservation made by Clauson, L.J., in *Toogood v. Wright*, [1940] 2 A. E. R. p. 309.

(i) *Vide supra*, s. 148 (3).

(k) *Aldred's Case* (1610), 9 Co. 57 b.

(l) *Leeman v. Montagu*, [1936] 2 A. E. R. 1677.

(m) *Brady v. Warren*, [1900] 2 Ir. R. 632; *Stearn v. Prentice Bros.*, [1919] 1 K. B. 394.

(n) *Farrer v. Nelson* (1885), 15 Q. B. D. p. 260, *per* Pollock, B. *Cp. Peech v. Best*, [1931] 1 K. B. p. 14. It is true, indeed, that in the old case of *Bowlston v. Hardy* (1597), Cro. Eliz. 547, it was decided that the making of coney burrows and the keeping of coneys therein which ate the crops on the adjoining land of the plaintiff was no cause of action. But the reason given for the decision is the very insufficient one that the defendant had no property in the coneys—that they were not *his*, and therefore that he was not answerable for them. Probably this case is no longer law, though approved and followed in *Stearn v. Prentice Bros.*, [1919] 1 K. B. 394, in which case, however, the rats had not been purposely accumulated by the defendants. See *Brady v. Warren*, [1900] 2 Ir. R. 632, and Williams, *Animals*, pp. 242-4, 258; Holdsworth in 55 L. Q. R. p. 591.

keeps bees in an unreasonable number (o) or manure in such unreasonable quantities as to attract flies (p) or, it seems, rats (q) he will be liable for a nuisance. It has been held that rooks are a nuisance to the neighbourhood where they are (r) (s).

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(o) *O'Gorman v. O'Gorman*, [1908] 2 Ir. R. 394.

(p) *Bland v. Yates* (1914), 68 S. J. 612. But see Williams, *Animals*, p. 260.

(q) *Stearn v. Prentice Bros.*, [1919] 1 K. B. 394.

(r) *Hannam v. Mockett* (1824), 2 B. & C. p. 943. But in the old and unsatisfactory case of *Dewell v. Sanders* (1619), Cro. Jac. 490, 491, it seems to have been held that pigeons were not a private nuisance. See Williams, *Animals*, pp. 250-3.

(s) For the relation of liability in nuisance to the rule in *Rylands v. Fletcher*, *vide supra*, s. 145, and Williams, *Animals*, p. 262.

## CHAPTER XIX

## LIABILITY FOR DANGEROUS CHATTELS

## § 149. Liability for Dangerous Chattels

1. *Liability of possessor of a dangerous chattel.*—"There can be no liability *ex dominio solo*. There is, so to speak, an element of danger in every chattel; it may break, it may be defective in such a way as to allow of misuse, and the result may be injury; but . . . there must always be found somewhere the element of negligence on his part to make the owner of a chattel liable for that injury" (a). To this the only exception is the special case of aircraft which we have already considered (b). Liability for damage done by dangerous chattels is to be considered under three heads:—

- (a) The liability of the possessor of a chattel to persons permitted or invited to make use of it;
- (b) The liability of him who delivers a chattel for damage suffered by the recipient of it;
- (c) The liability of him who delivers a chattel for damage suffered by other persons than the recipient.

2. *Liability for delivery of a dangerous chattel.*—With the first of these cases we have already dealt (c). In the second case, where a dangerous chattel is *delivered* by the defendant to the plaintiff, the liability of the defendant depends on the terms, express or implied, of the contract between them. The extent of responsibility varies in different classes of contracts. "The extent of the obligation must vary with the occupation of the person delivering the article; for example, it would be higher in the case of a chemist selling a dangerous chemical than in the case of a layman" (d). Thus in a contract of sale there is in many cases

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(a) *Oliver v. Saddler*, [1929] A. C. p. 599, *per* Lord Dunedin; *Hewitt v. Bonvin*, [1940] 1 K. B. p. 194, *per* du Parcq, L. J.

(b) *Supra*, s. 47 (9). But the fact of ownership is some evidence for the jury that at the material time a motor car was being driven by the owner of it or by his servant or agent; but it is evidence liable to be rebutted by proof of the actual facts *Barnard v. Sully* (1931), 47 T. L. R. 557. Contrast *Hewitt v. Bonvin*, [1940] 1 K. B. 194.

(c) *Supra*, s. 127.

(d) *Taylor & Sons v. Union Castle S.S. Co.* (1932), 48 T. L. R. p. 250, *per* MacKinnon, J.

an implied warranty that the goods are fit for the purpose for which they are bought (e). In such cases the seller is responsible in damages for any injury caused by a dangerous imperfection in the goods, apart altogether from any negligence (f). In a contract for the hiring of chattels there is a similar warranty of fitness and safety, and a similar liability for dangerous defects (g). In a contract for the carriage of goods by a person under a statutory duty to carry there is an implied warranty that the goods may be safely carried and are not dangerous (h), and if the goods are dangerous the consignor must give notice to such a carrier, unless the means of knowledge that the goods are dangerous are equally open to both parties (i). In other contracts there is in general no implied warranty, but merely a duty to use care, so that the defendant is not liable except for the negligence of himself and his servants. Again, the recipient of a chattel may expressly agree to run all risks, and in this case there is no duty even to disclose concealed dangers actually known. Thus, in *Ward v. Hobbs* (k) the defendant sold to the plaintiff at auction a herd of pigs which to the knowledge of the defendant were infected with typhoid fever. In the conditions of sale it was provided

(e) Sale of Goods Act, 1893, s. 14.

(f) *Randall v. Newson* (1877), 2 Q. B. D. 102; *Priest v. Last*, [1903] 2 K. B. 148; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608.

(g) *Hyman v. Nye* (1881), 6 Q. B. D. 685. The warranty in contracts of hiring does not extend to latent defects which are not discoverable by reasonable care on the part of any one. So also with a contract which consists partly in the rendering of services, partly in the supply of goods: *Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46 (fitting new connecting rods to car); *Watson v. Buckley*, [1940] 1 A. E. R. 174 (dyeing a man's hair with dangerous hair-dye).

(h) In *Brass v. Maitland* (1856), 6 E. & B. 470, Lord Campbell, C.J., and Wightman, J., held that the consignor is liable if he does not give notice that the goods are of a dangerous nature, whether he is himself ignorant of the fact or not; Crompton, J., thought that the duty to give notice is imposed only if the consignor is aware of the danger. The view of the majority of the Court has been adopted by Fletcher-Moulton, L.J., and Farwell, J., in *Bamfield v. Goole and Sheffield Transport Co., Ltd.*, [1910] 2 K. B. 94, and by the Court of Appeal in *Gt. N. Ry. v. L. E. P. Transport*, [1922] 2 K. B. 742, and it is accepted by Scrutton, L.J., in his book on *Charterparties*, art. 81, and the writers in *Halsbury's Laws of England* (iv, 58; xxiii, 581 and (semble) xxx, 302-3). The view of Crompton, J., has, however, been preferred by Willes, J., in *Hutchinson v. Guion* (1858), 5 C. B. (N.S.) 149; Vaughan-Williams, L.J., in *Bamfield's Case*; Atkin, J., in *Mitchell, Cotts & Co. v. Steel Bros.*, [1916] 2 K. B. 610; and Mr. Carver in his *Carriage by Sea*, art. 278. Atkin, J., in the case referred to held that the shipment of goods which might involve the ship in danger of forfeiture or delay is precisely analogous to the shipment of a dangerous cargo. *Contra*, McCordie, J., in *Transoceanica Societa v. Shipton*, [1923] 1 K. B. 81.

(i) *Acatos v. Burns* (1878), 3 Ex. D. 282; *Transoceanic Societa v. Shipton*, [1923] 1 K. B. 81.

(k) (1878), 4 A. C. 18.

that the animals were to be sold and taken with all faults, and no disclosure of the danger was made. The pigs died, and infected other pigs belonging to the plaintiff, which also died; yet it was held by the House of Lords that he had no cause of action (l).

3. *Gratuitous bailments and gifts.*—In the case of a gratuitous loan or gift of a chattel, on the other hand, there is not even the duty of reasonable care. "The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him. "The principle of law as to gifts", says Willes, J., in *Gautret v. Egerton* (m), "is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee." With the duty imposed in a case of a contract of gratuitous service we have already dealt (n).

4. *Liability to third persons on delivery of dangerous chattel.*—It remains to consider the liability of him who delivers a dangerous chattel for damage suffered, not by the recipient himself, but by some third person. When A, for example, sells or gives a defective gun to B, who sells or gives it to C, who is injured by the bursting of it, is A under any liability to C?

*No liability for breach of contract with another person.*—It is clear on general principles that he who by delivering a dangerous chattel to one person causes harm to another is not responsible to the latter merely on the ground that he has been guilty of a negligent breach of a contract with the former. Thus, in *Earl v. Lubbock* (o) the defendant contracted with the owner of a van to put it in repair, and he performed his contract so negligently that when the plaintiff, the servant of the owner, was driving the van one of the wheels came off and the plaintiff was thrown to the ground and injured. It was held by the Court of Appeal that he had no cause of action against the defendant. The defendant's contract with the plaintiff's master was, so far as the plaintiff was concerned, merely *res inter alios acta*, and the duty of care

(l) On the other hand, a sale expressly excluding all warranties merely leaves subsisting a duty to disclose known dangers: *Clarke v. Army & Navy Co-operative Society*, [1903] 1 K. B. 155.

(m) (1867), L. R. 2 C. P. 375. Cp. A. L. Smith, L.J., in *Coughlin v. Gillison*, [1899] 1 Q. B. p. 147.

(n) *Supra*, s. 130 (5).

(o) [1905] 1 K. B. 253. *Vide infra*, p. 575.

thereby imposed on the defendant was a duty towards the other party to the contract only, and not a duty towards all the world (p).

5. *Cases in which liability exists.*—Nevertheless, although there is no liability in such cases merely on the ground of the defendant's breach of contract with the immediate recipient of the dangerous thing, there are certain other circumstances which will create a good cause of action, and it remains to consider what they are. Such liability exists in the following cases:—

(a) *Fraud.*—The defendant is responsible if he fraudulently represents the chattel to be safe, and so misleads the recipient into causing damage to the plaintiff. Thus, in *Langridge v. Levy* (q) the defendant sold to the plaintiff's father for the use of the plaintiff, a gun which he fraudulently stated to be of good construction, and the plaintiff, having been injured by the bursting of the weapon, was held entitled to sue the seller for damages, although there was no contract between them. This is simply a special application of the general principle, which we shall consider in a subsequent chapter, that damage done to one person by fraudulently deceiving another is an actionable tort (r).

(b) *Negligence.*—The defendant is liable if he has been guilty of a breach of a duty of care owed to the plaintiff. Such a duty of care will arise in three cases.

(1) *Things dangerous in themselves* (rr).—A distinction is drawn between things classed as dangerous in themselves and things dangerous in the particular case or *sub modo*. This distinction is difficult to support in logic. There is nothing which is at all times and in all circumstances dangerous; there is "an element of danger in every chattel" (s). Scrutton, L.J., has said (t):

(p) So also *Winterbottom v. Wright* (1842), 10 M. & W. 109. See Lord Atkin's explanation of this case in *Donoghue v. Stevenson*, [1932] A. C. pp. 588-9. Cp. in the case of the occupier of dangerous premises *Cavalier v. Pope*, [1906] A. C. 428. *Supra*, s. 134 (4).

(q) (1837), 2 M. & W. 519.

(r) Cp. 54 L. Q. R. 57, n. 84.

(rr) "There is a peculiar duty to take precaution imposed upon those who send forth or install such articles [dangerous in themselves] when it is necessarily the case that other parties will come within their proximity": *Dominion Natural Gas Co. v. Collins*, [1909] A. C. p. 646.

(s) *Oliver v. Saddler*, [1929] A. C. p. 599, *per* Lord Dunedin. Cp. *supra*, p. 499. See Stallybrass in 3 Camb. L. J. 376 *sqq.*, where there is a full discussion of the authorities.

(t) *Hodge & Sons v. Anglo-American Oil Co.* (1922), 12 Ll. L. Rep. p. 187. Cp. *Watson v. Buckley*, [1940] 1 A. E. R. p. 184; *Duncan v. Cammell Laird* (1943), 171 L. T. p. 189. Scrutton, L.J.'s statement has been criticised by Atkinson, J., *Burftt v. Kille*, [1939] 2 K. B. p. 749, on the ground that "the distinction rests not on the measure of the danger, but on the circumstances creating the duty".



"Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing, instead of an obvious wolf." And Hilbery, J. (u), "can think of only the wild animal as something which has a dangerous nature. Most inanimate things become dangerous only if, in certain circumstances, they are likely to be employed dangerously". Lord Atkin regarded "the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right" (v). But all the members of the House in *Donoghue v. Stevenson* (x) appear to have agreed that the distinction, whether natural or not, is accepted in English law. And Lord Wright does not think that in practice there is any difficulty in drawing the line (y). "Some things are obviously and necessarily dangerous unless the danger is removed by appropriate precautions. . . . Others are only dangerous if there is negligence" (z). He gave as illustrations of the former category a savage animal and a performance on a flying trapeze, but the latter is not a chattel. In another case (y) he defined an inherently dangerous thing as "something which if left, may at any moment, and under modern circumstances, cause damage", and said that "a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous, that is to say, they cannot be handled without a serious risk". It has been held that danger is danger to life, limb or health, and a document containing a false valuation is not a dangerous thing for this purpose (a). Even so the liability in the case of dangerous things is founded upon the ordinary principles of negligence. "There must always be found somewhere the element of negligence on his part to make the owner of a chattel

(u) *Parker v. Oloro, Ltd.*, [1937] 3 A. E. R. p. 528.

(v) *Donoghue v. Stevenson*, [1932] A. C. p. 595.

(x) [1932] A. C. 562, pp. 569, 595, 600, 602, 611. Cp. *Northwestern Utilities v. London Guarantee Co.*, [1936] A. C. p. 118. But Goddard, L.J., thinks that the decision has relieved the Court from the task of considering whether the thing is dangerous in itself, or the use to which it is to be put: *Paine v. Colne Valley Electricity Co.* (1938), 160 L. T. p. 126. Cp. *Duncan v. Cammell Laird* (1948), 171 L. T. p. 188, per Wrottesley, J.

(y) *Wray v. Essex C. C.* (1936), 155 L. T. pp. 496-7.

(z) *Glasgow Corporation v. Muir*, [1943] A. C. p. 464.

(a) *Old Gate Estates v. Toplis* (1939), 161 L. T. 227. But notwithstanding the language of Wrottesley, J., in that case (for the decision of which it was merely necessary to say that the case was covered by *Derry v. Peek*, *infra*), it is submitted that a harmless thing may fall under the rule in *Donoghue v. Stevenson* if it is rendered a danger to an interest in property.

liable" (b). The case of dangerous things, according to Lord Macmillan (c), is "a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety". And Lord Atkin said (d): "The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods: so that not only the degree of care but the range of persons to whom a duty is owed may be extended" (e).

(2) *Non-disclosure of known dangers*.—If the defendant has actual knowledge of the dangerous nature of the chattel delivered by him, and gives no warning of it to the recipient, he is liable for resulting injury to third persons. "Any one", says Cotton, L.J. (Bowen, L.J., concurring) in *Heaven v. Pender* (f), "who . . . without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." In other words a chattel not dangerous in itself is brought into the category of dangerous things if there is knowledge of a dangerous defect (g), as where a valve was reassembled with the bridge upside down so that steam escaped and scalded the plaintiff (h).

He who delivers a dangerous chattel owes to third persons the same duty of care (but no more) that he owes to the recipient himself in the case of a gift or gratuitous bailment (i). Thus,

(b) *Oliver v. Saddler*, [1929] A. C. p. 599, *per* Lord Dunedin. The same learned law lord in dealing with allowing dangerous things to be in a position to which the public have access said: "The root of this liability is negligence": *Fardon v. Harcourt-Rivington* (1932), 146 L. T. p. 392.

(c) *Donoghue v. Stevenson*, [1932] A. C. pp. 611-2.

(d) S. C. p. 696.

(e) It is for the Court and not for the jury to decide whether a thing is dangerous in itself with a view to seeing whether any special rule of law is applicable to it: *Blacker v. Lake* (1912), 106 L. T. 553 (not overruled on this point by *Donoghue v. Stevenson*).

(f) (1883), 11 Q. B. D. at p. 517. Cp. *Barnes v. Irwell Valley Water Board*, [1939] 1 K. B. pp. 44, 46.

(g) Cp. the doctrine of *scienter* in the case of animals, *infra*, s. 146 (8).

(h) *Howard v. Furness Houlder, Ltd.*, [1936] 2 A. E. R. 781, 792. Cp. 54 L. Q. R. 52-3. So there may be inherent danger in a normally safe thing by reason of the position in which it is: *Coates v. Rawtenstall B. C.* (1937), 157 L. T. 415.

(i) Cp. *Blacker v. Lake and Elliot* (1912), 106 L. T. 533, at p. 540, *per* Lush, J.; *Earl v. Lubbock*, [1905] 1 K. B. at p. 258, *per* Stirling, L.J.

in *Farrant v. Barnes* (k) the defendant delivered to a carrier a carboy of nitric acid without informing him of the dangerous nature of its contents, and was held liable in damages to the carrier's servant who was injured by the bursting of the carboy while he was carrying it on his shoulders.

Even in the case of things dangerous in themselves it is a good defence to the original deliveror in some cases if the damage was occasioned by the act of a third party in connection with the thing. If he hands on the dangerous thing, with warning of its character, to a competent person who knows of its character, though neither the warning nor the knowledge is of the exact amount of the danger, the original deliveror is not liable to third parties for such action of the receiver, which is unreasonable in view of the knowledge or warning. His action is a *nova causa interveniens* (l). *A fortiori* if the receiver was under a duty to examine the thing.

*Delivery of dangerous chattels to children.*—The rule is otherwise when dangerous chattels are delivered to children under the age of discretion. A person in possession of a dangerous instrument, such as a loaded gun, is liable if he delivers it to or negligently allows it to be taken by a child who does mischief with it (m).

(3) *Negligence with respect to unknown dangers.*—After a bitter conflict of opinion it was finally settled by a majority of three to two in the House of Lords that the deliveror of a defective article may sometimes be liable to a person who is injured thereby with whom he has no contractual relationship although he has not been guilty of fraud, although the article does not belong to a class of things dangerous in themselves, and although the defendant had no knowledge of the dangerous nature of the thing. In *Donoghue v.*

(k) (1862), 11 C. B. (N.S.) 553. Cp. *Anglo-Celtic Shipping Co., Ltd. v. Elliott* (1926), 42 T. L. R. 297.

(l) *Hodge v. Anglo-American Oil Co.* (1922), 12 Ll. L. Rep. p. 187, per Scrutton, L.J., quoted by the same learned Judge in *Bottomley v. Bannister*, [1932] 1 K. B. p. 473. Cp. *Kubach v. Hollands*, [1937] 3 A. E. R. p. 911; *Hanson v. Wearmouth Coal Co.*, [1939] 3 A. E. R. p. 54, Bevan, p. 46, and cases cited, *infra*, p. 575, n. (r). *Contra* Underhay in 14 Can. Bar Rev. p. 300, n. 67, and Goodhart in 57 L. Q. R. p. 163.

(m) *Dixon v. Bell* (1816), Holt N. P. 233; 1 Starkie 287; on appeal 5 M. & S. 198; explained by Scrutton, L.J., in *Hodge v. Anglo-American Oil Co.* (1922), 12 Ll. L. Rep. 187; *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Williams v. Eady* (1893), 10 T. L. R. 41; *Sullivan v. Creed*, [1904] 2 Ir. R. 317; *Burfit v. Kille*, [1939] 2 K. B. 743 (a "safety pistol" a dangerous thing); *Ricketts v. Erith B. C.* (1943), 169 L. T. 396 (a penny bow and arrow not a dangerous thing). Cp. the rule as to dangerous premises and children: *Cooke v. Midland Gt. W. Ry. of Ireland*, [1909] A. C. 229; s. 133, *supra*.

*Stevenson* (n) the plaintiff suffered from shock and severe gastro-enteritis as a result of drinking a bottle of ginger-beer manufactured by the defendant which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which, since the bottle was of dark opaque glass and was closed with a metal cap, could not be detected until the greater part of the contents of the bottle had been consumed. It was held that the defendant owed a duty to take care that in his process of manufacture snails did not get into and remain in bottles which he filled with ginger-beer. In so holding, it was necessary to distinguish a large body of previous authority which was done with great dexterity by Lords Atkin and Macmillan. Scrutton, L.J., said (o) that a "new view" was involved in the decision, from which Lords Buckmaster and Tomlin emphatically dissented. But all the earlier authorities were exhaustively discussed in that case and it is unnecessary to go over the ground again (p).

The difference of opinion on this topic is explained, as Lord Macmillan pointed out (q), by the fact that here "two rival principles of law find a meeting-place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well-established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. . . . There is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort".

But we are still left uncertain as to when a duty of care is owed by the deliveror of a chattel, which is not known by him to be dangerous, to persons other than those with whom he has a contract who are injured owing to a defect in the chattel. We have already discussed (r) the attempts of Lords Atkin and Macmillan to

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(n) [1932] A. C. 562.

(o) *Farr v. Butters*, [1932] 2 K. B. p. 617. See 5 Mod. L. R. 246.

(p) Earlier authorities on the subject now seem to be mainly of antiquarian interest, but reference may be made to 29 H. L. R. 866; 32 H. L. R. 633; 16 L. Q. R. 168, and especially to an article by Bohlen, 45 L. Q. R. 343, and Salmond, 7th ed., s. 126 (8). It is difficult to reconcile with *Donoghue v. Stevenson* the proposition of Wrottesley, J., that where a harmless thing has been turned into a dangerous thing the doer of the act is not liable, if a reasonable man would not have perceived that what had been done or omitted turned the article into a dangerous article: *Duncan v. Cammell Laird* (1943), 171 L. T. p. 189.

(q) [1932] A. C. pp. 609–610.

(r) *Supra*, s. 120 (3).

generalise the principle, but for the purposes of *Donoghue v. Stevenson* it was not necessary to lay down any wider proposition than this: "Where a person places a manufactured article of food or drink upon the market and has intentionally so excluded interference with, and examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, the consumer will have an action of negligence if the manufacturer has not exercised reasonable care to secure that the article shall not be harmful to the consumer" (s).

It is impossible to forecast how far the Courts will extend this principle (t). As Lord Wright said in *Grant v. Australian Knitting Mills* (u): "No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision." It has already received extension in many directions. It is not limited to articles of food and drink. In *Grant v. Australian Knitting Mills* (w) the plaintiff recovered damages against the manufacturers of some woollen underwear when he contracted dermatitis as a result of an excess of sulphites which had been negligently left in the garments by the manufacturers. It is not limited to manufacturers. It applies to repairers (x), assemblers (y) and distributors (z). It is not only the consumer or user who is protected; the protection is extended to all those through whose hands the goods may pass (a). Nor is it

(s) Cp. Lord Thankerton at pp. 603-4, Lord Macmillan at pp. 620, 622.

(t) Cp. Pollock in 49 L. Q. R. 22 *sqq.* As extended to the cases now to be mentioned it might cover *Bamfield v. Goole Transport Co.*, [1910] 2 K. B. 94, which was discussed and doubted by Salmond. See ninth edition, p. 549, n. (o).

(u) [1936] A. C. p. 107.

(w) [1936] A. C. 85. In this case the manufacturers guaranteed to replace the garment if it shrank, and Evatt, J., in his dissenting judgment in the High Court of Australia (1933), 50 C. L. R. p. 440, said "the existence of such a guarantee from the manufacturers to the ultimate purchaser, whatever its utility or futility from a point of view of contractual liability, furnishes conclusive evidence of a deliberate intention to create a 'close', 'special' and 'direct' relationship with the purchaser, as those expressions are employed in the *Snail Case*." Contrast Goddard, L.J., in *Haseldine v. Daw*, [1941] 2 K. B. p. 379. See 5 Mod. L. R. p. 247.

(x) *Malfrout v. Noxal* (1935), 51 T. L. R. 551 (sidecar negligently fitted to motor-cycle); *Haseldine v. Daw*, [1941] 2 K. B. 343, 363, 375; *Herchstal v. Stewart and Arden*, [1940] 1 K. B. 155; *Stennett v. Hancock*, [1939] 2 A. E. R. 578.

(y) *Howard v. Furness Houlder*, [1936] 2 A. E. R. 781.

(z) *Watson v. Buckley*, [1940] 1 A. E. R. p. 182.

(a) *Barnett v. Packer & Co.*, [1940] 3 A. E. R. 575.

necessary that the defendant should have intentionally excluded intermediate interference or examination (b).

It is now generally accepted that *Earl v. Lubbock* (c), which we have discussed above (d), is to be explained on the ground that the duty was there alleged to arise solely out of contract (e) and that that case, if it were properly pleaded, would be decided differently to-day (f). But both in *Donoghue's Case* (g) and in *Grant's Case* (h) *Earl v. Lubbock* was distinguished on the ground that the negligence was too remote, and the case is still apparently good law. As has been said by Goddard, L.J. (i), "many of the suggested difficulties of *Donoghue v. Stevenson* disappear if it is realised that the decision was . . . essentially one on the question of remoteness" (k). It may well be that a workman may be able to recover for his injuries where the manufacturer has put upon the market, with the knowledge that it is going to be used by a workman, a machine defective in construction in a way that no reasonable examination can be expected to discover (l). It is quite clear that where the plaintiff himself can discover the defect by reasonable examination he cannot recover damages (m), and he will not recover if the defendant might reasonably have anticipated that there would be an examination by some person interposed between himself and the plaintiff (n). In order to relieve

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(b) *Haseldine v. Daw*, *supra*, pp. 376-7. *Contra*, *Evans v. Triplex Safety Glass Co.*, [1936] 1 A. E. R. p. 285.

(c) [1905] 1 K. B. 253.

(d) *Supra*, s. 149 (4).

(e) *Haseldine v. Daw*, *supra*, pp. 362, 378-9; *Stennett v. Hancock*, *supra*, p. 583; *Buckner v. Ashby and Horner*, [1941] 1 K. B. p. 329. Cp. Pollock, p. 439.

(f) *Old Gate Estates v. Toplis* (1939), 161 L. T. p. 229, *per* Wrottesley, J.; *Buckner v. Ashby and Horner*, *supra*, p. 331, *per* Atkinson, J.; *Haseldine v. Daw*, *supra*, p. 379, *per* Goddard, L.J. *Earl v. Lubbock* has been distinguished out of existence (54 L. Q. R. p. 67), and Goodhart has expressed the hope that it will now be decently interred and that its ghost will cease from troubling the law of torts (56 L. Q. R. p. 22). Cp. Winfield, pp. 590-2), but in spite of all the obituary notices that have been written, "there are still some hopeful spirits who indulge in the vain belief that it can be restored to life", 57 L. Q. R. p. 164. These include Landon, 57 L. Q. R. pp. 182-3; Chapman, 54 L. Q. R. 46-8; and, *semble*, Clauson, L.J., *Haseldine v. Daw*, *supra*, p. 368. It must be admitted that plaintiff's counsel insisted that the case did not rest upon contract: [1905] 1 K. B. p. 254.

(g) *Per* Lord Atkin at p. 592, *per* Lord Macmillan at p. 615.

(h) [1936] A. C. p. 107.

(i) *Haseldine v. Daw*, *supra*, at p. 377.

(k) Cp. *Donoghue v. Stevenson*, [1932] A. C. p. 622, *per* Lord Macmillan. Cp. Lord Buckmaster's *reductio ad absurdum*, at pp. 577-8.

(l) *Per* Greer, L.J., in *Farr v. Butters*, [1932] 2 K. B. p. 619. Cp. *Oliver v. Saddler*, [1929] A. C. 584.

(m) *Farr v. Butters*, [1932] 2 K. B. 606.

(n) *Herchstal v. Stewart and Arden*, [1940] 1 K. B. 155; *Haseldine v. Daw*, [1941] 2 K. B. pp. 375-8; *Buckner v. Ashby and Horner*, [1941] 1 K. B. pp. 330-5;

the defendant from liability there must be a probability, not a mere possibility, of intermediate examination (o) (p).

6. We have seen (q) that there must always be found somewhere the element of negligence to make the defendant liable. In *Donoghue's Case* Lord Macmillan said *obiter* (r) that in these cases there is no presumption of negligence nor is there any justification for applying the maxim *res ipsa loquitur*. But in *Grant's Case* Lord Wright said (s): "negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances". Somebody must have been in fault, and the plaintiff "is not required to lay his finger on the exact person in all the chain who was responsible". That is to say that in his opinion the maxim *res ipsa loquitur* does apply. This, it is submitted, is the better opinion (t), though it will sometimes be difficult for a blameless defendant to point his finger at the actual wrongdoer.

*Stennett v. Hancock*, [1939] 2 A. E. R. p. 583. See also Goodhart in 54 L. Q. R. pp. 59 *sqq.*, Underhay in 14 Can. Bar Rev. pp. 295—305; 5 Mod. L. R. 205; and in Roman-Dutch Law, McKerron, p. 238.

(o) *Paine v. Colne Valley Electricity Co.* (1938), 160 L. T. p. 126 (where Goddard, L.J., said that Lord Atkin in *Donoghue's Case*, p. 599, by "possibility" meant "possibility in a business sense"); *Haseldine v. Daw*, *supra*, p. 376, *per* Goddard, L.J. *Contra*, *Dransfield v. British Insulated Cables* (1937), 54 T. L. R. 11; *Evans v. Triplex Safety Glass Co.*, [1936] 1 A. E. R. p. 285; *Otto v. Bolton*, [1936] 2 K. B. 46; *Duncan v. Cammell Laird* (1943), 171 L. T. pp. 188—9; Chapman, in 54 L. Q. R. pp. 54—7.

(p) Lord Macmillan suggested in *Donoghue's Case*, at p. 622, that "it may be a good general rule to regard responsibility as ceasing when control ceases". Cp. *Barnett v. Packer & Co.*, [1940] 3 A. E. R. p. 577, but Lord Wright has shown in *Grant's Case*, at p. 104, that this test might prove embarrassing.

(q) *Supra*, s. 139 (5).

(r) [1932] A. C. p. 622.

(s) [1936] A. C. p. 101.

(t) Cp. 55 L. Q. R. 6, 352, 1 Mod. L. R. p. 59, and see *Chaproniere v. Mason* (1905), 21 T. L. R. 633 (stone in Bath bun). See also Underhay in 14 Can. Bar Rev. 287—94. In *Daniels v. White & Son* (1938), 160 L. T. 128, Lewis, J., found it unnecessary to decide between the two views, as he held that in any event the defendants, manufacturers of a sealed bottle of lemonade containing carbolic acid, by proving a fool-proof method of cleaning and filling the bottles and adequate supervision, had discharged the onus upon them of disproving negligence. But this seems contrary to *Grant's Case*: see 55 L. Q. R. 6.

## CHAPTER XX

## FRAUD: DECEIT AND INJURIOUS FALSEHOOD

*Two kinds of fraud.*—Wrongs of fraud or misrepresentation are of two kinds essentially distinct—(a) the wrong of deceiving the plaintiff so that he causes harm to himself by his own mistaken act, (b) the wrong of deceiving other persons so that they by their mistaken acts cause harm to the plaintiff. The first of these injuries may be called, in a narrow and specific sense of the term, the wrong of Fraud or Deceit; the second has no recognised distinctive title, and in default of a better designation it will here be called the wrong of Injurious Falsehood. We proceed to consider the former of these in the present chapter.

## § 150. Deceit

1. *Deceit defined.*—The wrong of deceit consists in the act of making a wilfully false statement with intent that the plaintiff shall act in reliance on it, and with the result that he does so act and suffers harm in consequence (a).

2. *Deceit by words or conduct.*—The false statement may be made either by words or by conduct. Any conduct designed to deceive another by leading him to believe that a certain fact exists is equivalent in law, as in morals, to a statement in words that that fact does exist. Thus, it is a fraud to obtain goods on credit in Oxford by wearing without right an undergraduate's cap and gown (b), or to take measures for concealing the defects of an article sold (c).

3. *Non-disclosure is not deceit (cc).*—In order to found an action for deceit the defendant must have made a *positive* false statement; a mere passive non-disclosure of the truth, however deceptive in fact, does not amount to deceit in law. "No mere silence will ground

(a) *Pasley v. Freeman* (1789), 3 T. R. 51; *Smith v. Chadwick* (1882), 20 Ch. D. 27; 9 A. C. 187; *Derry v. Peek* (1889), 14 A. C. 337; *Bradford Building Society v. Bardsley*, [1911] 2 A. E. R. 205, 211.

(b) *R. v. Barnard* (1837), 7 C. & P. 784.

(c) *Horsfall v. Thomas* (1862), 1 H. & C. p. 99.

(cc) See S. & W., s. 93.



the action of deceit" (d). This rule, however, is subject to the following qualifications:—

*Exceptions.*—(a) The non-disclosure of a part of the truth may make the statement of the residue positively false. It is permissible to tell the whole truth, or to tell none of it, but it is not always possible to tell merely part of it without falling into positive falsehood. "Half the truth"<sup>b</sup>, said Lord Chelmsford (e), "will sometimes amount to a real falsehood." "Every word", said James, L.J. (f), "may be true, but if you leave out something which qualifies it you may make a false statement: for instance, if pretending to set out the report of a surveyor you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement." So where a husband was under agreement to pay half his income to his wife, and sent her a sum without disclosing that it was less than half his income, it was held that he had made an implied statement that it was half his income and he was guilty of deceit (g).

(b) Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered: for example, to cover over the defects of an article sold, with intent that they shall not be discovered by the buyer, has the same effect in law as a statement in words that those defects do not exist (h).

(c) If the defendant makes a statement which he believes to be true, and he afterwards discovers that it is false, before it has been acted on by the plaintiff, or if he makes a statement which is true when made but becomes false to his knowledge before it has been acted on, it is his duty to disclose the truth, and a failure to do so will be accounted an actionable fraud (i).

(d) *Arkwright v. Newbold* (1881), 17 Ch. D. p. 318; *Bradford Building Society v. Borders*, *ubi supra*.

(e) *Peek v. Gurney* (1873), L. R. 6 H. L. p. 392.

(f) *Arkwright v. Newbold* (1881), 17 Ch. D. p. 318.

(g) *Legh v. Legh* (1930), 143 L. T. 151.

(h) *Schneider v. Heath* (1813), 3 Camp. 506 (ship with rotten timbers taken from slipway, and put into water to conceal defects from purchaser).

(i) *Incedon v. Watson* (1862), 2 F. & F. 841; *Brownlie v. Campbell* (1889), 5 A. C. at p. 950, *per* Lord Blackburn. *Cp. With v. O'Flanagan*, [1936] Ch. 575. In *Arkwright v. Newbold* (1881), 17 Ch. D. 301, the question is considered and left open by Cotton and James, L.J.J., pp. 325, 329, and by Lord Porter in *Bradford Building Society v. Borders*, [1941] 2 A. E. R. at p. 228. Lord Wright (at p. 220) was "prepared to assume" for the purposes of that case that not only was the person who made such a false representation liable, but also "any person, who

(d) In certain cases there is a statutory duty of disclosure, the breach of which is an actionable fraud (k).

4. *Statement must be one of fact.*—To found an action for the tort of deceit the misrepresentation must be a false statement of fact, and not a mere broken promise. If the words of the defendant amount to a mere promise, they cannot be the basis of an action of tort, and impose no liability on him unless they conform to all the requirements of a valid contract. There is no such thing known to the law as a promise which is not good enough for a contract, but the breach of which is actionable as a tort (l).

In the proposition that an action of deceit will lie only for a statement of fact, the term fact is used to include everything except a promise. Thus, a statement of opinion, if wilfully false, is actionable as a tort (m). "A representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact" (n). Similarly there seems no real reason to doubt that an action will lie for a fraudulent misrepresentation of law (o). So also an action of tort will lie for a false representation of intention. An unfulfilled promise to do a thing is actionable as a contract or not at all; a false statement of intention to do a thing may be actionable as a tort. Thus, in *Edgington v. Fitzmaurice* (p), the directors of a company were held liable for fraud in borrowing money on behalf of the company on a false statement of the purpose to which the loan was to be applied. "The state of a man's mind", said Bowen, L.J. (q), "is as much a fact as the state of his digestion" (r).

5. *Statement must be wilfully false. The rule in Derry v.*

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though not a party to the fraudulent original representation, afterwards learns of it and deliberately and knowingly uses the delusion created by the fraud in the injured party's mind in order to profit by the fraud".

(k) For example, the Companies Act, 1929, s. 85.

(l) *Jorden v. Money* (1854), 5 H. L. C. 185.

(m) *Anderson v. Pacific Insurance Co.* (1872), L. R. 7 C. P. p. 69. See S. & W., s. 92.

(n) *Bisset v. Wilkinson*, [1927] A. C. p. 182.

(o) See *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360; *Eaglesfield v. Marquis of Londonderry* (1877), 4 Ch. D. 693; *Derry v. Peek* (1889), 14 A. C. 337; *Beattie v. Lord Ebury* (1872), L. R. 7 Ch. 777.

(p) (1885), 29 Ch. D. 459.

(q) *Ibid.*, p. 483.

(r) It is not an actionable fraud, however, for a seller or buyer to obtain an advantageous bargain by falsely stating that he is not prepared to take less or give more for the property than a certain sum. In such a case the plaintiff can show no legal damage; he has lost a better bargain, indeed, but he has lost nothing to which he had any legal right: *Vernon v. Keys* (1810), 12 East 632.

*Peek*.—A false statement is not actionable as a tort unless it is wilfully false. Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. This is the anomalous rule established by the House of Lords in the leading case of *Derry v. Peek* (s). Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act.

*Derry v. Peek* (s) was a case in which the promoters of a company issued a prospectus containing a negligent misrepresentation as to the powers of the company, and in reliance on this statement the plaintiff took shares in the company. The promoters were held not liable in damages, on the ground that there was no proof that the error was fraudulent (t).

6. *Test of wilful falsehood*.—When, then, is a statement wilfully false within the meaning of the rule in *Derry v. Peek*? The test is the existence of a genuine belief in the truth of the statement. It is not necessary for liability that the defendant should have known it to be false; it is sufficient if he did not genuinely and honestly believe it to be true. Every statement is explicitly or implicitly a statement as to the belief of the speaker, and if that belief does not exist the statement is knowingly and wilfully false. "An untrue statement", said Lord Bramwell (u), "as to the truth or falsity of which the man who makes it has no belief is fraudulent; for in making it he affirms he believes it, which is false."

It is sometimes said that it is sufficient for liability that the statement should be made recklessly. The term recklessly, however, must here be taken to be used to indicate the absence of any genuine belief—the presence of conscious ignorance of the truth of the matter. Recklessness, in the sense of gross negligence, is no

(s) (1889), 14 A. C. 337. For a criticism of this decision, see Pollock in 5 L. Q. R. 410, to which Sir William Anson replied, 6 L. Q. R. 72. Jeremiah Smith, 14 H. L. R. 184, *Harvard Essays* 325, thinks that on the facts as found the decision was right in an action of deceit, but that an action of negligence would have lain. But see 8 L. Q. R. p. 7. Winfield in 51 L. Q. R. p. 258 well says of *Derry v. Peek*: "That has settled the law and I venture to think that it is bad law." See also the discussion of this case in *Nocton v. Ashburton*, [1914] A. C. 932; Bohlen on "Misrepresentation as deceit, negligence or warranty" in 42 H. L. R. 733, and Green, *Judge and Jury*, ch. 10.

(t) See also *Low v. Bouverie*, [1891] 3 Ch. 82; *Angus v. Clifford*, [1891] 2 Ch. 449; *Le Lievre v. Gould*, [1893] 1 Q. B. 491.

(u) *Smith v. Chadwick* (1884), 9 A. C. p. 203. Cp. *Derry v. Peek* (1889), 14 A. C. p. 374, *per* Lord Herschell.

ground of liability. No negligence, however gross, amounts to fraud (v).

Although an absence of reasonable grounds for believing a statement to be true is not in itself a ground of liability, it is important evidence that no such belief really exists, and therefore that the defendant is guilty not of negligence, but of fraud. "The ground upon which an alleged belief was founded is a most important test of its reality" (w).

*Ambiguity.*—If a statement is ambiguous, it must be taken in the sense in which the defendant himself meant it—that is to say, in the sense in which he intended that it should be understood by the plaintiff. It is immaterial that some other sense is more natural, and that the plaintiff understood the statement in that sense and was deceived by it; for in such a case the defendant is guilty of negligence only, and not of fraud (x).

7. *Exceptions to rule in Derry v. Peek.*—The rule in *Derry v. Peek* is subject to the following exceptions :—

(a) *Contractual duty.*—When there is a contractual relation between the plaintiff and defendant which involves a contractual duty to use care in the making of statements, the rule in *Derry v. Peek* is excluded (y). A person may take on himself by contract a duty which the common law does not impose upon him.

It is to be noticed, however, that even where there is a contractual duty of careful statement, the rule in *Derry v. Peek* is excluded only in favour of the person with whom the contract is made, and not in favour of third persons who are injured by negligent statements made in breach of it. Thus, in *Dickson v. Reuter's Telegraph Co.* (z) the defendant company negligently addressed and delivered to the plaintiffs a telegram intended for another person, directing a shipment of barley from Valparaiso to England. The plaintiffs, believing that the message was meant for them, acted in pursuance of it and suffered serious loss. Yet it was held by the Court of Appeal that they had no cause of action. The misrepresentation was, indeed, the breach of a contractual duty

(v) *Supra*, s. 7; Anson, pp. 174-7; S. & W., s. 91.

(w) *Derry v. Peek* (1889), 14 A. C. p. 375, per Lord Herschell.

(x) *Angus v. Clifford*, [1891] 2 Ch. at p. 472, per Bowen, L.J.; *Smith v. Chadwick* (1884), 9 A. C. at p. 201, per Lord Blackburn. Cp. Devlin in 53 L. Q. R. pp. 360-1. There are, indeed, several *dicta* to the contrary, but they are prior to *Derry v. Peek* and must now be treated as unsound. But see Winfield, p. 430.

(y) See, for example, *De la Bere v. Pearson, Ltd.*, [1908] 1 K. B. 280.

(z) (1877), 3 C. P. D. 1. Cp. *Le Lievre v. Gould*, [1893] 1 Q. B. 491.

of care, but the contract was made only with the sender of the telegram, and as between the recipient and the telegraph company it was *res inter alios acta* (a). This principle remains unaffected by the decision in *Donoghue v. Stevenson* (b).

(b) *Fiduciary relationship*.—Where there has been a breach of a special duty recognised and enforced by the Court of Chancery, whether arising from the fiduciary relationship of the parties or the special circumstances of the case, the defendant will be liable for “constructive fraud”, even though he has no fraudulent intention. In such a case no damages can be given for deceit, but the plaintiff will be given an indemnity for the loss he has suffered—an equitable remedy. So in *Nocton v. Ashburton* (d) a mortgagee claimed to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. Neville, J., found that the solicitor had not been guilty of fraud, but the House of Lords held that that finding did not preclude the plaintiff from obtaining relief on the footing of a breach of duty arising from the fiduciary relationship.

(c) *Warranty of authority*.—Every person who purports to act as the agent of another is deemed in law to have entered into an implied contract of warranty of authority with any person who contracts or otherwise deals with him in reliance on his authority. If, therefore, the agent misrepresents the existence or extent of his authority, he is liable in damages for any loss thereby suffered by those who have dealt with him; the rule in *Derry v. Peek* being excluded by the existence of a contract implied in law (e).

(d) *Estoppel*.—The rule as to estoppel by representation is not affected by *Derry v. Peek*, and may in certain cases so operate as to impose liability in damages for a false statement which is not fraudulent. A company, for example, which registers a forged transfer of shares is liable by way of estoppel to a purchaser who

(a) For criticisms of this decision see Pollock, pp. 441 *sqq.*; Buckland in 51 L. Q. R. 639.

(b) [1932] A. C. 562. *Supra*, s. 120 (3). It was so held by Wrottesley, J., in *Old Gate Estates v. Toplis* (1939), 161 L. T. 227, 230. He, however, unnecessarily and, it is submitted, wrongly confined the rule in *Donoghue v. Stevenson* to negligence resulting in danger to life, limb or health. *Vide supra*, s. 149 (5), n. (a), at p. 570.

(d) [1914] A. C. 932.

(e) *Collen v. Wright* (1857), 8 E. & B. 647; *Starkey v. Bank of England*, [1903] A. C. 114.

buys the shares in reliance on the share-certificate so issued; for the company is estopped from denying the truth of that certificate, and therefore the title of the plaintiff (f).

(e) *Directors' liability under the Companies Act.*—By section 37 of the Companies Act, 1929, the rule in *Derry v. Peek* is excluded in the cases of negligent false statements contained in a prospectus issued by the promoters or directors of a company (g). The elaborate provisions of this enactment pertain rather to the law of companies than to that of torts, and need not be here considered.

(f) *Statutory duty.*—In certain cases a duty of giving correct information is imposed by statute, and in such cases the rule in *Derry v. Peek* has no application. Thus in *Dawson & Co. v. Bingley Urban District Council* (h), the defendant council was held liable in damages for incorrectly marking the situation of a fire-plug, damage thereby resulting to the plaintiff through the inability of the fire-brigade to find the fire-plug in time to extinguish with promptitude a fire on the plaintiff's premises.

(g) *Principal's Liability for fraud of agent.*—The judgments in the Court of Appeal in *London County Freehold Properties v. Berkeley Property Co.* (i) suggest that there may be yet another exception to the rule in *Derry v. Peek*. It is now well settled that a master may be vicariously liable for his servant's fraud (k). The principal is liable on general principles if he expressly authorises an agent to make a statement which the agent believes to be true but which the principal believes to be false (l), and he will also be liable if he purposely employs an agent who is ignorant of the facts and probably if he deliberately stands by and allows his innocent agent to make statements calculated to deceive (m). The difficulty arises if the principal knew that the facts stated by

(f) *Re Bahia and San Francisco Ry.* (1868), L. R. 3 Q. B. 584. See 177 L. T. Jo. 167, and contrast *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation* (1934), 50 T. L. R. 244.

(g) *Clark v. Urquhart*, [1930] A. C. 28.

(h) [1911] 2 K. B. 149. See p. 157, *per* Farwell, L.J. See, however, the discussion of this case in Robinson, *Public Authorities*, pp. 179—183, 191—197.

(i) (1936), 155 L. T. 190.

(k) *Supra*, s. 27 (3). And this even though the fraudulent representation reach the third party through the principal himself who believes the representations to be true: *Pearson & Son v. Dublin Corporation*, [1907] A. C. 351, as explained in *Anglo-Scottish Beet Sugar Corporation v. Spalding U. D. C.*, [1937] 2 K. B. 607, at pp. 619—21.

(l) *Ludgater v. Love* (1881), 44 L. T. 694.

(m) *Gordon Hill Trust v. Segall*, [1941] 2 A. E. R. p. 390. Cp. *Fuller v. Wilson* (1843), 3 Q. B. 58, 1009.

the ignorant and innocent agent were untrue but did not know and had no reason to believe that the agent would make the statements. The language used in the *London County Freehold Properties Case* is wide enough to suggest liability even in such a case (n), but the decision has been interpreted in a restrictive sense (o). Neither the principal nor the agent has made a fraudulent statement and it is difficult to see how two whites can make one black. "There is no way", it has been well said (p), "of combining an innocent principal and agent so as to produce dishonesty . . . you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind. You cannot add innocent knowledge to innocent knowledge and get guilty knowledge."

8. *Intent that statement shall be acted on (pp).*—A false statement is not actionable, whatever damage may result from acting in reliance on it, unless it was made with intent that the plaintiff should act in reliance on it in the manner in which he did act. He who tells lies is not responsible to the whole world for the consequences of them. The only person entitled to rely on a statement and to act accordingly is he who is intended to rely on it and to act upon it by the person making it. All others accept it at their own risk, and if they come to harm, must blame their own credulity only. Thus, in *Peek v. Gurney* (q) it was held that a person who in reliance on a fraudulent prospectus issued by promoters bought shares in the market and so suffered loss had no cause of action against the promoters : for the purpose of a prospectus is to induce persons to apply to the company for shares, not to induce them to buy in the market shares already issued. The plaintiff, therefore, had acted in a manner not intended, and had relied on the false statement for a purpose that was foreign to it (r) (s).

(n) So apparently Pollock, Torts, pp. 240-1; Contract, p. 470. See also Winfield, pp. 433-5.

(o) By Atkinson, J., in *Anglo-Scottish Beet Sugar Case*, *supra*.

(p) P. Devlin in his destructive criticism of the *London County Freehold Properties Case*, *supra*: 53 L. Q. R. 344, at p. 362. So *Cornfoot v. Fowke* (1840), 6 M. & W. 358, a case which has, however, not escaped criticism. See also *Bradford Building Society v. Borders*, [1911] 2 A. E. R. p. 223, *per* Lord Romer.

(pp) See S. & W., s. 95.

(q) (1873), L. R. 6 H. L. 377.

(r) A fraudulent prospectus, however, may be intended to be acted on by way of the purchase of shares in the market; it may, for example, be a device to raise the price of the shares. In such a case any member of the public buying shares in the market in reliance on it will have a good cause of action: *Andrews v. Mockford*, [1896] 1 Q. B. 372.

(s) See also *Barry v. Croskey* (1861), 2 J. & H. 1; *Edgington v. Fitzmaurice* (1886), 29 Ch. D. pp. 478, 482.

It is not necessary that the false statement should be made with intent that any specific individual should be deceived and act in reliance on it. A representation may be made to the public at large with intent that any member of the public may act on it, and in this case liability will be incurred towards any person so acting (*t*).

Nor need there be any intention to cause loss to the plaintiff; the only necessary intent is that the plaintiff shall be deceived and shall act in a certain way; and if, as the natural and probable result of so acting, any damage is suffered by him, the defendant is responsible for it, whether he meant that damage to ensue or not (*u*).

9. *Apparent intent*.—It is not enough, therefore, that it is the natural and probable consequence of the false statement that the plaintiff will rely and act on it, if this was not the intention of the defendant. It would seem on principle, however, that it is enough if the defendant's *apparent* intention was that the plaintiff should act on his statement, whatever his real and concealed intention may have been (*w*). If the defendant makes a wilfully false statement which the plaintiff naturally and reasonably believes to be made to him with intent that he shall act in reliance on it in a certain manner, and he does so act, it would seem right that the defendant should be estopped from alleging that his apparent was not his real intention. Thus, in *Richardson v. Silvester* (*x*) the defendant falsely, and to serve some purpose of his own the nature of which does not appear from the report, advertised another person's farm as to let, and was held liable to the plaintiff who had acted in reliance on the advertisement and incurred expense in inspecting the premises.

10. *Reliance on statement*.—No action will lie for a false statement unless the plaintiff did in fact rely and act upon it, even if he acted in the way intended by the defendant and suffered harm in consequence (*y*). A mere attempt to deceive is not actionable (*z*). It is sufficient, however, that the false statement was *one* of the reasons which induced the plaintiff to act as he did (*a*). Nevertheless, if the plaintiff, although he relied on the statement, would

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(*t*) *Andrews v. Mockford*, [1896] 1 Q. B. 372.

(*u*) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. p. 482, *per* Bowen, L.J.

(*w*) See *Polhill v. Walter* (1832), 3 B. & Ad. 114.

(*x*) (1873), L. R. 9 Q. B. 34.

(*y*) *Macleay v. Tait*, [1906] A. C. 24; *Nash v. Calthorpe*, [1905] 2 Ch. 237.

(*z*) *Cp. Horsfall v. Thomas* (1862), 1 H. & C. 90.

(*a*) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. at p. 485, *per* Fry, L.J.



have acted as he did, even had the statement not been made, he will have no cause of action (b). In such a case he has suffered no damage by the fraud.

11. *Negligent reliance*.—If the statement is actually relied on, it is no defence that the plaintiff was negligent or foolish in doing so, or that he had a full opportunity of discovering the truth for himself. Every man has in law a right to believe and act on all lies told him by others with intent to deceive him (c).

12. *Representations as to credit*.—There is one kind of false statement which, by reason of an anomalous rule of statute law, is no ground of action unless made in writing—namely, a representation as to the credit of a third person. This exception is established by the Statute of Frauds Amendment Act, 1828, commonly known as Lord Tenterden's Act, by which it is provided that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [sic] (d), unless such representation or assurance be made in writing signed by the party to be charged therewith".

The purpose of this enactment was to prevent the evasion of the fourth section of the Statute of Frauds (which requires a guarantee to be in writing) by suing on a verbal guarantee in an action of tort instead of contract, and alleging that the defendant had

(b) *Macleay v. Tait*, [1906] A. C. 24. But Sir John Salmond seems later to have come to the conclusion that it possibly is enough to establish a cause of action that the false representation contributed its weight to the sum total of the influences operating in the mind of the contracting party, even though the other influences would have been sufficient by themselves. See Salmond and Williams (2nd ed.), pp. 252-5. The question, however, seems mainly academic: for the wrongdoer has no right to institute a conjectural inquiry as to what would have happened if certain things had been said which were in fact not said, or had been said differently: *Smith v. Kay* (1859), 7 H. L. C. p. 750, *per* Lord Chelmsford, L.C.; Halsbury, xxiii, 50.

(c) *Redgrave v. Hurd* (1881), 20 Ch. D. 1. Nor is it any defence that the plaintiff's agent knew of the falsity of the statement, if the plaintiff himself did not: *Wells v. Smith*, [1914] 3 K. B. 722. See S. & W., p. 255.

(d) The word "upon" is nonsensical, and evidently represents some clerical error in the Act. It has been suggested with much probability that the word "credit" has been accidentally transposed, and should follow the word "upon", so that the phrase would read "may obtain money or goods upon credit". An alternative and less plausible suggestion is that "upon" is a mistake for "there-upon". However this may be, the word as it stands is meaningless, and must be disregarded in construing the section. See *Lyde v. Barnard* (1836), 1 M. & W. 101.

made a false and fraudulent representation as to the credit or financial ability of the debtor. A writing, therefore, has been made essential for the tort as well as for the contract (e).

The Act applies only to actions of tort based on fraudulent misrepresentation; not to actions for breach of contract or for the breach of some other duty of care in making representations (f).

The signature of an agent is not sufficient, for the Act requires the personal signature of the defendant himself (g). This is so even when the defendant is a body corporate—although in such a case no signature except that of an agent is possible. Thus, an incorporated bank is not responsible for a fraudulent representation as to credit made by a manager of one of its branches (h).

This unfortunately drafted enactment is not to be read literally in accordance with the vague and unrestricted generality of its terms, but is on the contrary to be restrictively construed by reference to the known object of the Legislature and the known mischief which it was intended to prevent (i).

In accordance with this restrictive interpretation the Act applies only to those cases in which the defendant's representations have been made for the purpose of inducing the plaintiff to give credit to the third person—that is to say, to trust the third person with the performance of some obligation towards the plaintiff; as, for example, repayment of money lent or payment for goods sold and delivered. Thus in *Lyde v. Barnard* (k), Lord Abinger says: "The true construction of the statute is, that the representation or assurance should concern or relate to the ability of the other person effectually to perform and satisfy the engagement of a pecuniary nature, into which he has proposed to enter, and upon the faith of which he is to obtain money, credit or goods." All of the decisions in which the Act has been held applicable are cases of this description.

Where, on the other hand, the plaintiff is induced by the defendant's representations to act in some other way than that of giving credit to a third person, Lord Tenterden's Act is not applicable,

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(e) *Lyde v. Barnard* (1836), 1 M. & W. p. 114.

(f) *Banbury v. Bank of Montreal*, [1918] A. C. 626.

(g) *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.

(h) *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560. In *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 269, in which a bank was held liable for fraudulent representations made by its manager as to the credit of a third person, the defence of Lord Tenterden's Act was not raised or considered.

(i) *Banbury v. Bank of Montreal*, [1918] A. C. p. 691, per Lord Atkinson.

(k) (1836), 1 M. & W. at p. 123. Cp. *Parks, B.*, at p. 116.

even though those representations may fall within the letter of the Act as relating to the character, conduct, ability, trade or dealings of that third person. Thus if the defendant has induced the plaintiff to buy the goodwill of A.'s business by fraudulent statements as to the nature, prosperity, and prospects of that business, the defendant will plead in vain that those statements were not in writing signed by him.

Lord Tenterden's Act is a good defence even though the intent of the defendant in inducing the plaintiff to give credit to the third person was thereby to obtain a pecuniary advantage for himself, as for example the payment of a debt owing to him by that third person. The statute looks to the immediate intent with which the false representation was made, not to the ulterior motive of the person who makes it (1).

### § 151. Injurious Falsehood: Slander of Title and Slander of Goods

1. *Injurious falsehood distinguished from deceit.*—We proceed now to the consideration of the second form of actionable misrepresentation—namely, that which we have termed Injurious Falsehood. The wrong of deceit consists, as we have seen, in false statements made to the plaintiff himself whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others. The one consists in misrepresentations made to the plaintiff, the other in misrepresentations made concerning him.

*Injurious falsehood defined.*—It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person or his property with the result that other persons deceived thereby are induced to act in a manner which causes loss to him. "That an action will lie for written or oral falsehoods not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce and where they do produce actual damage, is established law" (a).

2. *Distinguished from defamation.*—This wrong of injurious falsehood is to be distinguished not only from the wrong of deceit, but also from that of defamation, to which it is analogous, but from

(1) *Clydesdale Bank, Ltd. v. Paton*, [1896] A. C. 381.

(a) *Ratcliffe v. Evans*, [1892] 2 Q. B. p. 527, *per* Bowen, L.J.

which it is distinct. Both in defamation and in injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff; but in one case the statement is an attack upon his reputation, and in the other it is not. A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement (whether written or verbal) which injures him only by misleading other persons into action that is detrimental to him falls within the more lenient rule of liability which we are now considering (b).

3. *Slander of title*.—An important variety of this species of injury is that known as slander of title—namely, a false and malicious denial of the plaintiff's title to property: as, for instance, when a sale by auction is defeated or prejudiced by an adverse claim made to the property by the defendant, or when the plaintiff's trade is affected by a false charge that the goods offered by him for sale are an infringement of a patent or copyright (c).

4. *Slander of goods*.—Another example of the wrong of injurious falsehood is a false and malicious depreciation of the quality of the merchandise manufactured and sold by the plaintiff (d). No action, however, will lie for any statement, however false or malicious, which is nothing more than a statement by one trader that his goods are better than those of a rival. This is a special exception to the general rule of liability for injurious falsehood—an exception established to prevent traders from using litigation as a means of advertisement (e). It is otherwise, however, with a specific allegation of some defect in the plaintiff's goods, even though made by a rival with the view of promoting the sale of his own (f).

5. *Analogous cases*.—But an action for injurious falsehood lies

(b) *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; *White v. Mellin*, [1895] A. C. 154.

(c) *Smith v. Spooner* (1810), 3 Taunt. 246; *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Pitt v. Donovan* (1819), 1 M. & S. 639; *Green v. Button* (1835), 2 C. M. & R. 707; *Stewart v. Young* (1870), L. R. 5 C. P. 122; *Halsey v. Brotherhood* (1882), 19 Ch. D. 386; *Wren v. Weild* (1869), L. R. 4 Q. B. 780; *Pater v. Baker* (1847), 3 C. B. 831; *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901), 18 R. P. C. 95 (denying the plaintiffs' title to the use of a certain label).

(d) *White v. Mellin*, [1895] A. C. 154; *Linotype Co. v. British Empire Type-setting Co.* (1899), 81 L. T. 331; *Alcott v. Millar's Karri Forests, Ltd.* (1905), 91 L. T. 722.

(e) *White v. Mellin*, [1895] A. C. 154; *Hubbuck & Sons v. Wilkinson*, [1899] 1 Q. B. 86; *Evans v. Harlow* (1844), 5 Q. B. 624; *Young v. Macrae* (1862), 3 B. & S. 264. *Contrast Lyne v. Nicholls* (1906), 23 T. L. R. 86.

(f) *Alcott v. Millar's Karri Forests, Ltd.* (1905), 91 L. T. 722.

not only in cases of slander of title, slander of goods, and passing-off (which we shall consider in the next section), but in analogous cases. So in *Ratcliffe v. Evans* (g) the defendant was held liable in damages for having falsely and maliciously published in a newspaper a statement that the plaintiff had ceased to carry on business, in consequence of which statement the plaintiff's trade fell off. Bowen, L.J., said (h) that such an action was "an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title". Again, in *Riding v. Smith* (i), an action was held to lie against a person who caused loss of custom to the plaintiff by making false statements as to the character of his wife, who assisted him in his business. So in *Casey v. Arnott* (k) an action was brought for the false statement that the plaintiff's ship was unseaworthy, in consequence of which statement the crew refused to go to sea in her.

6. *Conditions of liability*.—"To support such an action it is necessary for the plaintiffs to prove (1) that the statements complained of were untrue; (2) that they were made maliciously—i.e., without just cause or excuse; (3) that the plaintiffs have suffered special damage thereby" (l).

7. *Malice* (m).—What is meant by malice in this connection? Lord Davey, in the passage already cited, defines it as meaning the absence of just cause or excuse. Notwithstanding Lord Davey's dictum, it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A *bona fide* assertion of title, however mistaken, if made for the protection of one's own interest or for some other proper purpose, is not malicious. In *Greers, Ltd. v. Pearman & Corder, Ltd.* (n) it was said by Bankes, L.J.: "Maliciously for this purpose means with some indirect object." Scrutton, L.J., says: "Maliciously, not in the sense of illegally, but in the sense of being made with some indirect or dishonest motive." In *British Ry. Traffic Co. v. The C. R. C.*

(g) [1892] 2 Q. B. 524.

(h) *Ibid.* p. 527.

(i) (1876), 1 Ex. D. 91.

(k) (1876), 2 C. P. D. 24.

(l) *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901), 18 R. P. C. p. 99, per Lord Davey; *White v. Mellin*, [1895] A. C. 154; *Barrett v. Associated Newspapers, Ltd.* (1907), 23 T. L. R. 666.

(m) This sub-section (which has been abbreviated in this edition) was quoted with approval by Maugham, J., in *Balden v. Shorter*, [1933] Ch. 427.

(n) (1922), 39 R. P. C. 406, 417.

Co. (o) McCardie, J., after a full examination of the authorities came to the same conclusion (p).

8. *Proof of damage*.—The requirement of proof of special damage must not be pressed too far. „Actual loss must be proved specially and with certainty, but more certainty and particularity than is reasonable must not be demanded. Good sense and justice demand that in some cases where it is not possible to specify particular instances of loss the Court should be satisfied by proof of a general loss of custom, the natural and direct result of the statement complained of (r).

### § 152. Injurious Falsehood : Passing Off

1. *The wrong of passing off*.—To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of *passing off* one's goods or business as the goods or business of another, and is the most important example of the wrong of injurious falsehood, though it is so far governed by special rules of its own that it is advisable to treat it separately. The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead (s). The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false and misleading devices, the benefit of the reputation already achieved by rival traders (t).

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(o) [1922] 2 K. B. 260. See also *Shapiro v. La Motta* (1923), 190 L. T. 622. F. H. Newark in an article in 60 L. Q. R. 366, after a careful examination of the early authorities, comes to the conclusion that the plaintiff need prove no more than that the words were spoken with intent to disparage, and that malice need only be proved if the defendant raises a privilege, *e.g.*, by claiming a title in himself. But Newark does not consider the Equity cases, and his conclusion is not justified by the language used in modern authorities.

(p) Under the Patents and Designs Act, 1907, s. 36, it is a tort to cause loss to any one by making threats of legal proceedings in respect of alleged infringements of patent rights, unless the allegations of infringement are true or the proceedings so threatened are commenced and prosecuted with due diligence.

(r) *Ratcliffe v. Evans*, [1892] 2 Q. B. pp. 531-2, *per* Bowen, L.J.; *Worsley & Co. v. Cooper*, [1939] 1 A. E. R. pp. 303-4.

(s) *Draper v. Trist*, [1939] 3 A. E. R. pp. 517-8, *per* Greene, M.R.

(t) It has been said (5 Mod. L. R. 146) that the tort of unfair competition has been recognised only in one of its possible applications, passing-off, but see Winfield, 649 *sqq.*

2. *Species of this wrong.*—The wrong of passing off assumes many forms, of which the following are the most important :—

(a) *A direct statement that the merchandise or business of the defendant is that of the plaintiff.*—Thus, it is an actionable wrong to seek to sell a publication by falsely putting the name of a well-known author on the title-page (u).

(b) *Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public.*—Thus, in *Hendriks v. Montagu* (x) the Universal Life Assurance Society obtained an injunction preventing a company subsequently incorporated from carrying on business under the name of the Universal Life Assurance Association (x).

(c) *Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it (y).*—A trade name means a name under which goods are sold or made by a certain person, and which by established usage has become known to the public as indicating that those goods are the goods of that person. A trade name is opposed to a merely *descriptive* name—namely, one under which goods are sold, but which indicates merely their nature, and not that they are the merchandise of any particular person (z).

(d) *Selling goods with the trade mark of the plaintiff or any deceptive imitation attached thereto.*—A trade mark is at common law any mark habitually attached by a trader to goods manu-

(u) *Lord Byron v. Johnston* (1816), 2 Mer. 29. But the bare unauthorised use of another's name without more (e.g., that it is a libel), is not actionable: *Dockrell v. Dougall* (1899), 80 L. T. 556; *Tolley v. Fry*, [1930] 1 K. B. pp. 478, 488. See 176 L. T. Jo. 343.

(v) (1881), 17 Ch. D. 638. *Contrast Office Cleaning Services, Ltd. v. Westminster Office Cleaning Association*, [1941] 2 A. E. R. 269, where it was said that "association" bears no resemblance in appearance or sense to the word "services".

(x) See also *Manchester Brewery Co. v. North Cheshire & Manchester Brewery Co.*, [1899] A. C. 83; *Pinet & Cie. v. Maison Louis Pinet*, [1898] 1 Ch. 179; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513; *Society of Motor Manufacturers v. Motor Manufacturers' &c. Insee. Co.*, [1925] Ch. 675.

(y) *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508 ("Glenfield Starch"); *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54 ("Yorkshire Relish"); *Montgomery v. Thompson*, [1891] A. C. 217 ("Stone Ales"); *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino*, [1924] 1 Ch. 179 ("Corona" cigars). Contrast *Jaques & Son v. Chess*, [1940] 2 A. E. R. 285 ("genuine Staunton chessmen").

(z) *Woodward, Ltd. v. Boulton Macro, Ltd.* (1915), 112 L. T. 1112 ("Gripe Water"); *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312 ("Vacuum Cleaner").

factured or sold by him in order to indicate that they are his merchandise, and by established usage known to the public as possessing that significance. At common law there is no difference between the law of trade names and that of trade marks (a). Under the Trade Marks Act, 1938 (b) no damages can be recovered for the infringement of an unregistered trade mark, but the rights of action for passing off goods as the goods of another person are not affected by the Act. The statute law as to the infringement of registered trade marks does not exclude or supersede this common law protection.

(e) *Imitating the get-up or appearance of the plaintiff's goods so as to deceive the public.*—When there is anything so characteristic in the get-up or appearance of the plaintiff's goods that it identifies those goods as the merchandise of the plaintiff, any deceptive adoption or imitation of that get-up or appearance is subject to the same rules as the deceptive adoption or imitation of his trade name or trade mark (c).

(f) *Selling second-hand goods as new goods manufactured by the plaintiffs (d).*

3. *Fraudulent intent not necessary.*—The Courts have wavered between two conceptions of a passing-off action—as a remedy for the invasion of a quasi-proprietary right in a trade name or trade mark, and as a remedy, analogous to the action on the case for deceit, for invasion of the personal right not to be injured by fraudulent competition (e). It has recently been said (f) that “the true basis of the action is that the passing off . . . injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business”. In general the violation of a right to property is actionable, even though it is innocent and though no damage has been proved. It is now generally accepted

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(a) *Millington v. Fox* (1838), 3 My. & Cr. 338.

(b) S. 2.

(c) *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748; *Edge (William) & Sons, Ltd. v. William Nicholls & Sons, Ltd.*, [1911] A. C. 698; *Illustrated Newspapers v. Publicity Services*, [1938] Ch. 414. Even passing off inferior goods by circulating catalogues copied from those of the plaintiff: *Masson Seeley & Co. v. Embosotype Mfg. Co.* (1924), 41 R. P. C. 160.

(d) *Gillette Safety Razor Co. v. Franks* (1924), 40 T. L. R. 606. Contrast *Champagne Heidsieck et Cie v. Buxton*, [1930] 1 Ch. 330.

(e) See Pollock, pp. 246–7, Cl. & L. p. 800, and Winfield, pp. 656–7. Contrast *Millington v. Fox* (1838), 3 My. & Cr. p. 352 with *Croft v. Day* (1843), 7 Beav. p. 88.

(f) *Draper v. Trist*, [1939] 3 A. E. R. p. 526, per Goddard, L.J. Cp. *Illustrated Newspapers v. Publicity Services*, [1938] Ch. p. 422.



that it is not necessary in an action for passing off to prove fraud—that is to say, an intent to deceive. It is sufficient in all cases to prove that the practice complained of is calculated (that is to say, likely) to deceive. At common law, indeed, it was necessary to prove an actual fraudulent intention (g). In equity, however, it was first established in *Millington v. Fow* (h) that this is not so, and that it is an actionable wrong to do anything which to the knowledge of the defendant will in fact deceive the public, even though such deception is not desired or intended. Since *Millington v. Fow* this principle has been repeatedly approved and adopted, and has now superseded the narrower doctrine of the common law (i).

4. *Actual deception or damage not necessary.*—The remedies of the plaintiff in an action for passing off are (1) an injunction; and (2) either damages or an account of profits, at the plaintiff's option. The uncertainty as to the conception underlying the action has led to uncertainty as to the requirement of proof of damage. "Damage or likelihood of damage to property is the gist of all such actions" according to many authorities (k), yet Greene, M.R., said in *Draper v. Trist* (l) that the right infringed is "one which was regarded at law as one the mere violation of which led to damage. In other words it was not regarded at law as a case in which damage was of the gist of the action". It is not necessary to prove any actual deception or actual resulting damage (m). It is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public (n). "The law assumes or presumes that, if the goodwill of a man's business has been interfered with by the passing off of

(g) *Crawshay v. Thompson* (1842), 4 M. & G. 357; *Edelsten v. Edelsten* (1863), 1 De G. J. & S. p. 199, per Lord Westbury, L.C.

(h) (1838), 3 My. & Cr. 338.

(i) *Singer Machine Manufacturers v. Wilson* (1877), 3 A. C. p. 391, per Lord Cairns; *Cellular Clothing Co. v. Maxton*, [1899] A. C. p. 334, per Lord Halsbury; *Spalding v. A. W. Gamage, Ltd.* (1915), 84 L. J. Ch. 449, per Lord Parker; *Draper v. Trist*, [1939] 3 A. E. R. p. 517, per Greene, M.R. But see the doubts of Clauson and Goddard, L.J.J., at pp. 525, 528. See Hanbury, Equity, pp. 101-2, 488.

(k) *Society of Motor Traders v. Motor Manufacturers' Insurance Co.*, [1925] Ch. p. 686, per Lawrence, J. Cp. Farwell, J., in *British Legion v. British Legion Club (Street)* (1931), 48 R. P. C. 555, and in *Sturtevant Engineering Co. v. Sturtevant Mill Co.*, [1936] 3 A. E. R. p. 145.

(l) [1939] 3 A. E. R. p. 518.

(m) *Blofeld v. Payne* (1833), 4 B. & Ad. 410.

(n) *Reddaway v. Bentham Hemp Spinning Co.*, [1892] 2 Q. B. p. 644, per Lindley, L.J. Cp. *Lever v. Goodwin* (1887), 36 Ch. D. 1; *Illustrated Newspapers v. Publicity Services*, [1938] Ch. 414.

goods, damage results therefrom" (o). This is sufficient for an injunction in equity and even for nominal damages at common law. In considering whether deception is probable, account is to be taken not of the expert purchaser, but of the ordinary ignorant and unwary member of the public (p). On the other hand it is not enough that a thoughtless person may unwarrantably jump to a false conclusion. In cases of fraud the onus of proving likelihood of damage is not heavy; the Court will<sup>9</sup> readily assume that the defendant will succeed in accomplishing that which he has set himself to accomplish; but where there is no fraud the onus is a very heavy one (q). Indeed, it may be that nothing more than nominal damages, if even these, can be given for an innocent passing off (r). In one respect it seems agreed that the protection given by the action differs from the protection given to a full right of property. No damages or account of profits will be granted in respect of innocent user before actual notice of the plaintiff's right. In this respect the right of a trader to be protected against deceptive competition is not like a right of property, an infringement of which, however innocent, will give rise to an action for damages (s).

5. *Descriptive name may become a trade name.*—A name originally merely descriptive, and therefore *publici juris*, may by exclusive use in connection with the plaintiff's goods acquire a secondary sense as the trade name of those goods, and will then become subject to the ordinary rule as to trade names; so that the use of it by other persons ceases to be *publici juris*, and is actionable unless they take sufficient precautions to prevent deception.

So, in *Reddaway v. Banham* (t), it was found by a jury that the term camel-hair belting had by long and exclusive association with the plaintiffs' manufacture come to mean not merely belting made from camel hair, but belting made by the plaintiffs. It had acquired a secondary sense, and had thereby become a trade name; and it was held by the House of Lords that for this reason it could

(o) *Draper v. Trist*, [1939] 3 A. E. R. p. 526, per Goddard, L.J. Cp. *Worsley & Co. v. Cooper*, [1939] 1 A. E. R. p. 310.

(p) *Singer Manufacturing Co. v. Loog* (1882), 8 A. C. p. 18, per Lord Selborne; *Johnston v. Orr-Ewing* (1882), 7 A. C. 219.

(q) *Society of Motor Manufacturers and Traders v. Motor Manufacturers' & Co. Insurance Co.*, [1925] Ch. pp. 686, 689, per Lawrence, J.

(r) *Draper v. Trist*, [1939] 3 A. E. R. pp. 518, 525, 528.

(s) *Edelsten v. Edelsten* (1863), 1 De G. J. & S. 185; *Slazenger & Sons v. Spalding*, [1910] 1 Ch. 257; *Fram Mfg. Co. v. Eric Morton & Co.* (1922), 40 R. P. C. 33. See Hanbury, p. 102.

(t) [1896] A. C. 199.

not be used by other persons, unless they took adequate precautions against deceiving the public by means of it (*u*).

The burden, however, of proving this secondary sense is not a light one. The Courts will not be easily persuaded to sanction such appropriation of words which belong to the common stock of our language (*v*). But even in these cases it seems, though suggestions have been made to the contrary (*w*), that fraud is not essential any more than in the case of a name which is primarily a trade name and not descriptive at all.

6. *Trade name may become merely descriptive*.—A name which is originally a trade name may through general use cease to indicate specifically the merchandise of any particular person, and may so become merely descriptive and *publici juris* (*x*). Thus, Liebig's Extract of Meat no longer means a material prepared by Liebig or his assigns (*y*), nor does Harvey's Sauce mean a sauce sold by the original maker of the article so called (*z*). In such a case the onus is reversed: it is for the defendant to show that the word-mark has entirely lost its original meaning, and that no purchaser can be deceived by its use. So in *Havana Cigar and Tobacco Factories, Ltd. v. Oddenino* (*a*), an injunction was issued against the defendant to prevent him from selling as "Corona cigars" cigars which were not of the Corona brand, even though of the Corona size and shape, unless it was first ascertained that the customer did not require a cigar of the Corona brand, although it was proved that the originally exclusive denotation of Corona had been extended so as to include some goods not of the plaintiffs' make.

7. *Deception by the use of a person's own name*.—The application of the rule as to passing off to cases in which the instrument of

(*u*) So also "Stone Ale", *Montgomery v. Thompson*, [1891] A. C. 217; "Glenfield Starch", *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; "Jaeger", *Professor Dr. G. Jaeger v. The Jaeger Co., Ltd.* (1927), 43 T. L. R. 220. See also *Rey v. Lecouturier*, [1908] 2 Ch. 715.

(*v*) Compare, for example, with the cases already cited the cases of *Cellular Clothing Co. v. Maxton*, [1899] A. C. 826; *Grand Hotel Co. of Caledonia Springs v. Wilson*, [1904] A. C. 103; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312.

(*w*) See, for example, *Cellular Clothing Co. v. Maxton*, [1899] A. C. p. 339, per Lord Shand.

(*x*) See *Powell v. Birmingham Vinegar Co.*, [1896] 2 Ch. p. 73, per Lindley, L.J.

(*y*) *Liebig's Extract of Meat Co. v. Hanbury* (1867), 17 L. T. (N.S.) 298.

(*z*) *Lazenby v. White* (1871), 41 L. J. Ch. 354, n.

(*a*) [1924] 1 Ch. 179. Cp. *Goddard v. Watford Co-operative Society* (1924), 41 R. P. C. 218 ("Goddard's Plate Powder"). Contrast *Jaques & Son v. Chess*, [1940] 2 A. E. R. p. 285 ("Staunton chessmen").

deception is the use by the defendant of his own personal name is obscure, and it is not easy to reconcile the decisions or *dicta* on the matter or to extract a definite principle from them (*b*). It would appear, however, that subject to certain qualifications an individual is entitled to trade under his own name regardless of the fact that his business may be thereby confused with the business of some other person bearing the same or a similar name. He is not bound to take any special precautions to avoid or minimise such confusion (*c*). If there are two grocers named John Brown, each of them is equally entitled to trade under that name, and there is no priority of right in him who first established his business. Nor does it make any difference in such a case that a trader using his own name is well aware of the fact that his business will be confused with that of a rival trader, and intends to take the advantage which such confusion will confer upon him (*d*). "The Court takes cognisance of acts, not motives" (*e*).

A surname is not a man's legal property, and if a man is called by some other than his real name he may acquire his second name by reputation (*f*). In such a case also he will not be restrained from using it honestly. So in *Jay's, Ltd. v. Jacobi* (*g*) the defendant, who was manageress of a ladies' outfitters' shop, had been known to everyone for fifteen years as Miss Jay, and it was held that she had acquired that name by reputation and was entitled to trade under it so long as she acted honestly, even though the similarity of the name to that of the plaintiffs might occasionally lead to the goods of the one being mistaken for those of the other.

But a man is not entitled to use his own name dishonestly in order that his goods may be passed off as and for the goods of another (*h*). But in order to deprive him of the right there must be evidence of dishonesty outside the mere use of the name, for example, a resemblance in the manner of the display of the name,

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(*b*) See the helpful discussion of this subject in Hanbury, *Equity*, pp. 490-3.

(*c*) *Contra* Bramwell, L.J., in *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. p. 761.

(*d*) *Kingston, Miller & Co., Ltd. v. Thomas Kingston & Co., Ltd.*, [1912] 1 Ch. 575; *Turton v. Turton* (1889), 42 Ch. D. 128; *John Brinsmead & Sons, Ltd. v. Brinsmead* (1913), 29 T. L. R. 237, 706; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896; *Rodgers (Joseph) & Sons v. Rodgers (W. N.) & Co.* (1924), 41 R. P. C. 277. See Winfield, pp. 659-60.

(*e*) *Brinsmead (John) & Sons v. Brinsmead* (1913), 29 T. L. R. p. 239, *per* Warrington, J.

(*f*) *Massam v. Thorley's Cattle Food Co.* (1880), 14 Ch. D. p. 760, *per* Bramwell, L.J.

(*g*) [1933] Ch. 411.

(*h*) *Sykes v. Sykes* (1824), 3 B. & C. 341; *Croft v. Day* (1843), 7 Beav. 84.

or the concealment of that part of the name which differs from the plaintiff's by the use of smaller characters (i). Again, if a defendant pleads that, although deception of the public is proved, the instrument of such deception is nothing more than the lawful exercise by him of his right to use his own name, he must show that the deception complained of is due exclusively to the use of his own name *simpliciter*, and that it is not due to the fact that he has abbreviated his name, or altered it, or added something to it, or used it in some special manner producing confusion not normally or necessarily incident to the mere exercise of his right to trade under his own name. Thus in *Short's, Ltd. v. Short* (k) the defendant Ernest Lewis Short established in competition with the business of the plaintiff company, "Short's Limited", a similar business which he carried on under the name of "Short's". An injunction was granted restraining him from carrying on the business of a wine and spirit merchant under the name of "Short's" so as to mislead the public into the belief that the business of the defendant was that of the plaintiff.

Although an individual trader is entitled to trade under his own name, even though he thereby gets the benefit of the reputation of a rival trader of the same name, an incorporated company has not the same right to use the names of its shareholders. By the Companies Act, 1929, a company is prevented from being registered with a name so closely resembling that of a company already registered as to be liable to cause confusion (l). Independently of this statutory provision, a company must select a name which is not calculated to deceive, and it is no excuse for choosing a deceptive name that a shareholder to whom that name belongs might lawfully use it in his own business. Thus in *Tussaud v. Tussaud* (m) an incorporated company, Madame Tussaud & Sons, Ltd., obtained an injunction against the registration of a new company in the same business under the name of "Louis Tussaud, Limited", notwithstanding that "Louis Tussaud" was the name of a promoter and shareholder of the new company (n).

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(i) *Brinsmead's Case*, *ubi supra*, per Warrington, J.

(k) (1914), 31 R. P. C. 294. Contrast *Jay's, Ltd. v. Jacobi*, [1933] Ch. 411.

(l) "But the very fact that the Legislature allows a descriptive name to be registered casts a duty on the Court to ensure that no company by registering such a name acquires a greater monopoly of the use in trade names of any words or combination of words in ordinary use than the Legislature has conferred on it": *Society of Motor Manufacturers and Traders v. Motor Manufacturers', &c. Insee. Co.*, [1925] Ch. 687, per Lawrence, J. See Companies Act, 1929, s. 17 (1) (a).

(m) (1890), 44 Ch. D. 678.

(n) See also *Fine Cotton Spinners' Association, Ltd. v. Harwood Cash & Co., Ltd.*, [1907] 2 Ch. 184; *W. H. Dorman & Co. v. Henry Meadows, Ltd.*, [1922]

8. *Forms of deception which are not actionable.*—The rule as to passing off is not to be extended to cases in which there is no appropriation by one man of the trade reputation or custom of another, but merely some other form of loss or inconvenience caused by the deception of the public. In the absence of actual fraud no action will lie in such a case. Thus, in *Day v. Brownrigg* (o) the plaintiff and defendant occupied adjoining villas, and the defendant changed the name of his residence, and gave it the same name as that of the plaintiff. An injunction to prevent this was refused, although it was proved that inconvenience would result to the plaintiff through the confusion thus caused. Had the parties been rival traders, the result would have been different. Similarly, in *Street v. Union Bank of Spain* (p) the plaintiff had long used as his telegraphic address the words *Street London*, but he failed to obtain an injunction against the defendant bank, which had recently adopted the same address, with resulting confusion and loss to the plaintiff in his business. Here also there was no passing off, because the businesses of the two parties were entirely distinct in nature.

### § 153. Injuries to Immaterial Property: Trade Marks

1. *Patents, copyrights, and trade marks.*—The forms of immaterial property known to our law are patents, copyright, registered trade marks, and the various franchises which may be vested in private persons, such as markets and ferries. A violation of any of these rights of property is an actionable tort. The law as to these matters is, however, too special in its nature to call for examination here. It belongs rather to the domain of the law of property. It is advisable, however, to point out here the true relation of the law as to trade marks to the common law of passing off.

2. *Trade Marks Acts.*—The law as to trade marks is now contained in the consolidating Trade Marks Act, 1938. A trade mark

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2 Ch. 832; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259. As to whether a company which has purchased the goodwill of an established business from an individual has the right to continue to use that individual's name, notwithstanding the risk of confusion with another business, see *Kingston, Miller & Co. v. Thomas Kingston & Co., Ltd.*, [1912] 1 Ch. 575; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678. Cp. *Sturtevant Engineering Co. v. Sturtevant Mill Co.*, [1936] 3 A. E. R. 137.

(o) (1878), 10 Ch. D. 294.

(p) (1885), 30 Ch. D. 156. See also *Imperial Tobacco Co. of India v. Bonnan*, [1924] A. C. 755.

validly registered under the Act of 1988 becomes thereby a species of incorporeal property analogous to a patent or copyright, and conferring upon the proprietor an exclusive right to the use of it in respect of the classes of goods in relation to which it is registered (section 4 (1)). The use of it or of any deceptive imitation of it by any other person is *per se* an actionable infringement of the statutory monopoly so created. The common law, on the other hand, recognised no monopoly or right of property in the use of any name, mark, or other trade description. The cause of action in a common-law action for passing off was not the infringement of any monopoly or right of property vested in the plaintiff, but damage done to the plaintiff in his business by the deceptive mode in which the defendant carried on his own. In other words, at common law the use of the plaintiff's trade mark was never in itself any cause of action, but was merely one of several means by which the wrong of deceiving the public to the plaintiff's prejudice might be committed. The result is that registration of a trade mark merely shifts the burden of proof on to the defendant.

## CHAPTER XXI

## INTIMIDATION

## § 154. Intimidation of a Person to his own Injury

1. *Two kinds of intimidation.*—The wrong of intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with. This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself, or that of other persons with resulting damage to the plaintiff. In other words, the defendant may either intimidate the plaintiff himself, and so compel him to act to his own hurt, or he may intimidate other persons, and so compel them to act to the hurt of the plaintiff.

2. *Intimidation of the plaintiff himself.*—Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention. “In my opinion”, says Hawkins, J., advising the House of Lords in *Allen v. Flood* (a), “any menacing action or language the influence of which no man of ordinary firmness or strength of mind can reasonably be expected to resist, if used or employed with intent to destroy the freedom of will in another, and to compel him, through fear of such menaces, to do that which it is not his will to do . . . amounts to an attempt to intimidate and coerce; and if such attempt is successful . . . the person wrongfully injured by it . . . may sue the coercer for reparation in damages” (b).

In such a case, however, it is clear that the threat complained

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(a) [1898] A. C. p. 17.

(b) See also *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. p. 614, *per* Bowen, L.J.



of must be a threat to do an act which is in itself illegal. No threat to exercise one's legal rights can amount to a cause of action, even if made for the purpose of intimidation or coercion, and even if inspired by malicious motives (c) (d).

### § 155. Intimidation of a Person to Another's Injury

1. *Intimidation of other persons to the injury of the plaintiff.*—In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff: for example, the intimidation of the plaintiff's customers whereby they are compelled to withdraw their custom from him, or the intimidation of an employer whereby he is compelled to discharge his servant, the plaintiff.

Intimidation of this sort is actionable, as we have said, in certain classes of cases; for it does not follow that, because a plaintiff's customers have a right to cease to deal with him if they please, other persons have a right as against the plaintiff to compel his customers to do so. There are at least two cases in which such intimidation may constitute a cause of action:—

- (a) When the intimidation consists in a threat to do or procure an illegal act;
- (b) When the intimidation is the act not of a single person, but of two or more persons acting together in pursuance of a common intention. This latter is one form of the tort of conspiracy with which we shall deal in the next chapter.

2. *Intimidation by threats of illegal act.*—Any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act. Thus in *Garret v. Taylor* (e) it was held that a quarryman had a good cause of action against the defendant who had by threats to mayhem and annoy them by vexatious litigation induced or coerced some of his customers to discontinue buying stones from

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(c) *Allen v. Flood*, [1898] A. C. 1; *Hardie & Lane, Ltd. v. Chilton*, [1928] 2 K. B. 306; *Crofter Harris Tweed Co. v. Veitch*, [1942] A. C. p. 467, *per* Lord Wright.

(d) Somewhat analogous are cases of molestation, such as *Keeble v. Hickeringill* (1706), 11 East 574 n.; *Carrington v. Taylor* (1809), 11 East 571; *The Tubantia*, [1924] P. 78. But see Winfield, pp. 651-2.

(e) (1620), Cro. Jac. 567; 2 Roll. Rep. 162

his quarry (f). So in *Tarleton v. McGawley* (g) two British ships, the *Othello* and the *Bannister*, were lying near each other off the coast of Africa, engaged in trading with the natives. A canoe manned by natives approached the *Bannister* for the purpose of trading, when the master of the *Othello*, with the intention of preventing this, fired a cannon at the canoe, and killed one of the crew, creating thereby such a panic among the natives that they ceased to trade with the *Bannister*. An action was successfully brought against the master of the *Othello* for the loss thus sustained by the owners of the *Bannister* (h).

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(f) Whether threats of vexatious litigation unaccompanied by threats of personal violence would have afforded a good ground of action, *quære*: *Allen v. Flood*, [1898] A. C. p. 105, *per* Lord Watson.

(g) (1793), 1 Peake 270. Cp. *Lyons v. Wilkins*, [1896] 1 Ch. 811; [1899] 1 Ch. 255.

(h) Two very early cases of boycotting in 1200 A.D. and 1201 A.D. will be found in 3 *Selden Society*, cases 7 and 106.

## CHAPTER XXII

## CONSPIRACY

## § 156. Conspiracy (a)

1. *Conspiracy a tort.*—It could not till recently be said with any certainty that there was any such tort as conspiracy. Sir John Salmond thought (b) that there was not and that the cases of conspiracy were in reality only instances of the tort of intimidation. But Lord Dunedin described this as “the leading heresy” (c), though there was much to be said for it on principle and authority. It is now, however, “too well established to be the subject of controversy” (d) that conspiracy is the gist of the wrong in many cases and that it is in the fact of the combination that the unlawfulness resides (e). In such cases conspiracy is an independent tort.

Irreconcilable *dicta* in the House of Lords and numerous decisions of the Court of Appeal and puisne Judges had reduced the law into a state of chaos (f). In *Sorrell v. Smith* (g) the House of Lords attempted to bring order into chaos, but unfortunately did not succeed, because of a diversity of views amongst the members of the Court. As a result of the speeches in *Crofter Hand Woven Harris Tweed Co. v. Veitch* (h) in 1941 order was introduced and it is now possible to state the law with some confidence.

*The famous trilogy.*—The confusion which previously prevailed

(a) There is a large literature upon the subject of this chapter. In particular see Haslam, *Trade Combinations*, cc. ii and iii; Holdsworth, *H. E. L.* viii, pp. 392–397; Pollock, *Torts*, pp. 253–70; and Landon's *Excursus*, p. 252; Report of the Royal Commission on Trade Disputes (1906); Harrison, *Conspiracy*, ch. 3; Dicey, 18 *L. Q. R.* 1. Reference may also be made to Ames, 18 *H. L. R.* 411, Lectures 399, *Harvard Essays* 150; Holmes, 8 *H. L. R.* 1, *Collected Papers* 117, *Harvard Essays* 162; Miles, *Dig.*, § 1038.

(b) See 6th ed., pp. 576–578. He cited Lord Lindley in *Quinn v. Leatham*, [1901] *A. C.* p. 538; Romer and Stirling, *L.J.J.*, in *Giblan's Case*, [1903] 2 *K. B.* pp. 619, 623; Lord Atkinson in *Conway v. Wade*, [1909] *A. C.* p. 516, and McCardie, *J.*, in *Pratt v. British Medical Association*, [1919] 1 *K. B.* 244. Cf. Lord Sumner in *Sorrell v. Smith*, [1925] *A. C.* p. 740; Lord Porter in *Crofter Company's Case*, [1942] *A. C.* p. 489.

(c) *Sorrell v. Smith*, [1925] *A. C.* p. 719.

(d) *Crofter Company's Case*, [1942] *A. C.* p. 489, *per* Lord Porter.

(e) *S. C.* pp. 461–2, *per* Lord Wright.

(f) *Ware and De Freville v. Motor Trade Association*, [1921] 3 *K. B.* p. 66, *per* Scrutton, *L.J.*; *Crofter Company's Case*, [1942] *A. C.* p. 472, *per* Lord Wright.

(g) [1925] *A. C.* 700.

(h) [1942] *A. C.* 435.

was largely due to the difficulty of explaining and reconciling the speeches in three cases in the House of Lords, *Mogul Steamship Co. v. McGregor, Gow & Co.* (i), *Allen v. Flood* (k) and *Quinn v. Leathem* (l), which Lord Cave described as the "famous trilogy of cases" (m). Though these cases have ceased from troubling, it is still desirable for a true understanding of the law to advert to them briefly, accepting the interpretation of the *ratio decidendi* given in the *Crofter Company's Case* as canonical.

*The Mogul Case.*—In *Mogul Steamship Co. v. McGregor, Gow & Co.* (n), the plaintiff alleged (*inter alia*) that the defendants, who were an associated body of traders in China tea, had wilfully caused loss to him, a rival trader, by compelling certain merchants in China to cease to act as his agents by means of a threat that if they continued to do so the agency of the defendant association would be withdrawn from them. This was held by the House of Lords to be no cause of action, it being a justifiable measure of self-protection on the part of the association to prevent the same persons from occupying the inconsistent position of agents both for the association and for the plaintiff, since the association had acted with the lawful object of protecting and extending their trade and increasing their profits and had not employed any unlawful means.

*Allen v. Flood.*—In *Allen v. Flood* (o) the defendant, the delegate of an ironworkers' trade union, warned the employers of the plaintiff that unless they discharged him, as they were entitled to do at any time, all the ironworkers would go on strike. The employers thereupon discharged the plaintiff and would not re-engage him. The jury found that the defendant had acted maliciously in inducing the plaintiff's employers to discharge him, but it was held that there was no cause of action. In *Allen v. Flood* the Court was dealing with an individual actor; no element of combination entered into it. The case is merely authority for the well-established proposition that, where the element of combination is absent, the motive of the defendant is immaterial, and that damage done intentionally and even malevolently to another gives no cause of action so long as no legal right of the other is infringed.

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(i) [1892] A. C. 25.

(k) [1898] A. C. 1.

(l) [1901] A. C. 495.

(m) *Sorrell v. Smith*, [1925] A. C. p. 711.

(n) [1892] A. C. 25. See *Crofter Company's Case*, pp. 450, 487.

(o) [1898] A. C. 1. See *Crofter Company's Case*, p. 466, *per* Lord Wright, and pp. 451, 487.

*Quinn v. Leathem*.—In *Quinn v. Leathem* (p) the facts were very similar but a conspiracy to injure was alleged. The plaintiff was a butcher who had a dispute with the trade union of which the defendants were officials, with respect to the employment of certain workmen who did not belong to the union. The defendants requested the plaintiff to discharge these men, but he refused. Whereupon, with a view of compelling him to do so, the defendants compelled the plaintiff's chief customer to cease to deal with him, by threatening that otherwise they would call out that customer's workmen. The jury found that the defendants had maliciously conspired to induce the plaintiff's customers not to deal with the plaintiff (pp). It was held that the plaintiff was entitled to sue the defendants for damages for the loss which he had sustained through the withdrawal of his customer. A conspiracy to injure gives a cause of action.

2. *Sorrell v. Smith*.—Nearly a quarter of a century later the case of *Sorrell v. Smith* (q) came before the House of Lords. In that case, a newspaper combination threatened to cut off supply to a distributor unless he discontinued supply to a particular news vendor, the plaintiff. The combination acted as they did for the sole purpose of protecting their trade, and were not actuated by spite or any desire to injure the plaintiff. It was held that they had not committed any actionable wrong. The "famous trilogy" was much discussed and Lord Dunedin made a valuable contribution to the law, but the majority of the House was of opinion that the case was merely an unusual illustration of the proposition decided in the *Mogul Case*. Lord Cave, in an opinion with which Lord Atkinson concurred, laid down (r) two propositions: "(1) a combination of two or more persons wilfully to injure a man in his trade is an unlawful act and, if it results in damage to him, is actionable; (2) if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues", provided no unlawful means are used. "The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class

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(p) [1901] A. C. 495. See *Crofter Company's Case*, pp. 473-5, 466, 487.

(pp) The malice was apparently to be found in the fact that the defendants had refused a reasonable compromise and that their object was merely to victimise the plaintiff's customers.

(q) [1925] A. C. 700. See *Crofter Company's Case*, pp. 449-50.

(r) [1925] A. C. p. 712.

there is not, while in cases of the latter class there is, just cause or excuse for the action taken."

These propositions were undoubtedly adequate for the decision of the case before the House, and were accepted as correct in the *Crofter Company's Case* (s) but they were not exhaustive (t), nor were they intended so to be.

3. *The Crofter Company's Case*.—Light was thrown on many dark places in *Crofter Hand Woven Harris Tweed Co. v. Veitch* (u) in the House of Lords in 1941. Harris tweed originally was not only woven by hand looms in the island of Lewis by the crofters but was woven out of yarn which had been hand spun in the island. Later the spinning and finishing were done by mills in the island but the yarn was still woven by the crofters. Ninety per cent. of the spinners in those mills, and all the dockers at the island port of Stornoway were members of the Transport and General Workers' Union, of which the defendants were officials. The union officials were anxious that only members of the union should be employed as weavers by the mill-owners and that the spinners' wages should be increased, but the mill-owners refused to agree to this on the ground that it was impossible in view of the cut-throat competition of the plaintiffs and others who also produced Harris tweed and employed the crofters to weave by hand yarn which they imported from the mainland at a cheaper price than that spun in the island. It was to the interest of the union to have one hundred per cent. membership and to the interest of the mill-owners to eliminate competition and for these reasons the defendants *bona fide* believed their action to be in the general interest of the Harris tweed industry. The defendants instructed the dockers not to handle the plaintiffs' yarn or to export the cloth made from it, and the dockers, without any breach of contract, acted on their instructions. It was held that, even if there was a combination between the defendants and the mill-owners, the plaintiffs had no cause of action since the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining.

4. *Combination to damage actionable except to advance legitimate interests*.—The following propositions are based upon the speeches in that case. A combination wilfully to do an act causing

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(s) [1942] A. C. p. 449.

(t) *Ibid.*, pp. 442, 445, 493.

(u) [1942] A. C. 435. For a valuable discussion of the sociological bearings of this case see Friedmann in 6 Mod. L. R. 1; Legal Theory, pp. 348 *seq.*

damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable as a conspiracy (*w*). To this there is an exception where the defendants' real and predominant purpose is to advance their own lawful interests in a matter in which they honestly believe that those interests would directly (*x*) suffer if the action against the plaintiff was not taken (*y*). It had previously been thought by some (*z*) that a combination to damage a man was not actionable unless it was inspired by malice or "disinterested malevolence". The true proposition seems to be that it is actionable unless there is some justification. Such justification will be found if it is inspired by self-interest. The pursuit of selfish ends provides in law, whatever may be the case in morals, its own justification (*a*). Even the fact that the damage inflicted to secure such a legitimate selfish purpose is disproportionately severe, though it may throw doubts on the *bona fides* of the avowed purpose, does not necessarily involve liability (*b*). But it is suggested that, though not inspired by malevolence, a combination would be actionable if its object was to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation or if it were inspired by a dislike of the religious views or the politics or the race or the colour of the plaintiff or by mere wantonness (*c*).

It remains to be seen what objects other than self-interest will be recognised as providing a justification. "The objects or purposes for which combinations may be formed are clearly of great variety" (*d*), and it is probably as profitless to attempt to define them as it is to attempt to define the justification for inducing a breach of contract (*e*). In determining the existence of a justification regard must be had to the circumstances of each case as it arises (*f*). Clearly self-interest is not to be interpreted too strictly,

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(*w*) At pp. 446, 451, 464; Lord Porter at p. 495 apparently doubts this proposition.

(*x*) *I.e.*, not indirectly as by loss of a large subscription offered to a trade union: *per* Viscount Simon, L.C., at p. 447.

(*y*) At pp. 446, 450, 464, 469. The justification is purely subjective. It seems that if the embargo in the *Crofter Company's Case* had been reimposed after the investigation had shown it to be based on an ill-founded view of the defendants' interests it could no longer be justified: *per* Viscount Maugham at pp. 456-7.

(*z*) *E.g.*, Lord Sumner in *Sorrell v. Smith*, [1925] A. C. p. 737; *Evatt, J.*, in *McKernan v. Fraser* (1931), 46 C. L. R. p. 398.

(*a*) *Crofter Company's Case*, [1942] A. C. pp. 450, 469-71, 496

(*b*) At p. 447, *per* Viscount Simon, L.C.

(*c*) At pp. 445, 451, 471.

(*d*) At p. 479, *per* Lord Wright.

(*e*) *Supra*, s. 96 (4).

(*f*) *Cp.* Lord Wright at p. 476, *per* Lord Porter at p. 496.

and acts done for the protection of trade interests, such as limiting competition, increasing profits or raising wages are within the protection, as are other acts done in the genuine belief that the prosperity of the defendants' industry is jeopardised (g), and it would seem that for this end it may be legitimate to punish a man in order to deter others from similarly offending (h). But apart from such cases we get little guidance, though Lord Porter hinted (i) that the promotion of morality and Lord Wright (k) that the promotion of the religious interests of a parish might afford a justification.

5. *Mixed motives*.—But motives are often mixed (l). In the case of conspiracy this may be true in two respects. The same individual may be inspired by more than one motive, or different parties to the combination may be inspired by different motives. In the former case liability will depend upon ascertaining which is the predominant object or the true motive or the real purpose of the defendant (m), and that must be judged broadly as a jury would judge (n). It is less easy to determine how a difference in the objects of different parties to the combination affects liability (o). It seems clear that there need not be a complete identity of interest between all the parties. "It is sufficient if all the various combining parties have their own legitimate trade or business interests to gain, even though these interests may be of differing kinds" (p), as in the *Crofter Case* itself. "Each party", said Lord Porter (q), "may well have its own private end to gain. The joint aim may at any rate be no more than a desire for prosperity or peace in the industry, and yet the combination may be justified." But it would seem that if the interest of one of the parties is merely separate and mercenary or if one of the parties is actuated merely by hate or vindictive spite that party can have no lawful excuse (r), and if the other knew of and countenanced his purpose by giving

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(g) Cp. Lord Wright at p. 477.

(h) At p. 475, *per* Lord Wright.

(i) At p. 496.

(k) At p. 478.

(l) Cp. Lord Sumner in *Sorrell v. Smith*, [1925] A. C. pp. 739, 742.

(m) [1942] A. C. at pp. 445, 452, 478.

(n) At p. 490, *per* Lord Porter.

(o) This question was fully considered in the High Court of Australia in *McKernan v. Fraser* (1931), 46 C. L. R. 343, by Evatt, J.

(p) [1942] A. C. p. 453, *per* Viscount Maugham.

(q) At p. 495.

(r) At pp. 453, 480.



assistance to his malicious acts, he also would be a participant in the wrong (s).

6. *Unlawful means*.—Even if the predominant purpose is legitimate it will not provide a defence if unlawful means are used. Lord Thankerton pointed out in the *Crofter Company's Case* (t) that that case did not decide what limit is to be placed on the means by which pressure in such cases is exerted. It is doubtful whether it would be lawful for a union to bribe non-members to strike. Some guidance is given by decided cases. In *Ware and De Freville, Ltd. v. Motor Trade Association* (u) the Court of Appeal held that the defendant association and its members, being manufacturers of motor cars, were justified *bona fide* in trade interests in fixing the retail selling prices, not merely by refusing to deal with recalcitrant traders, but by stop-listing such traders and threatening all other persons in the trade who dealt with persons on the stop-list that they would be put on that list themselves. And in *Thorne v. Motor Trade Association* (w) the House of Lords held in a similar case that the association were entitled to require a member to pay a reasonable fine to the association as an alternative to having his name put on the stop-list, if he sold goods below the list price. But the demand of a sum extortionate in amount would be evidence of an intent to injure as opposed to an intent to protect trade interests (x). Again Lord Buckmaster said in *Sorrell v. Smith* (y): “A threat to do an act which is lawful cannot create a cause of action, whether the act threatened is to be done by many or by one” (z). It is submitted that when the object of the combination is legitimate the unlawful means which will give a good ground of action against persons acting in concert are the same as the unlawful means which will give a good ground of action against a defendant acting alone (a).

(s) At p. 495, *per* Lord Porter.

(t) At p. 460.

(u) [1921] 3 K. B. 40. Approved by Lord Buckmaster in *Sorrell v. Smith*, [1925] A. C. p. 747.

(w) [1937] A. C. 797. See C. K. Allen in 54 L. Q. R. pp. 13 *sqq.*

(x) *S. C.* at p. 824, *per* Lord Roche, *cp.* p. 818 (Lord Wright). Similarly in order to obtain payment of a gaming debt it is legitimate to threaten to report a defaulter to Tattersalls, an independent committee for the protection of book-makers, *Burden v. Harris* (1937), 54 T. L. R. 86, but a threat to notify a social club or the trade protection societies of the default is a threat to injure and illegitimate: *Norreys v. Zeffert*, [1939] 2 A. E. R. 187, 190.

(y) [1925] A. C. p. 747.

(z) *Sorrell v. Smith*, [1925] A. C. p. 747, *per* Lord Buckmaster, quoted with approval by Lord Wright in the *Crofter Company's Case*, [1942] A. C. p. 467.

(a) *Supra*, s. 155 (2).

7. *Not limited to business interests or pressure on third persons.*—The opinion given in the *Crofter Company's Case* has settled some other points in the law of conspiracy. The action is not limited to trade competition and labour disputes nor is the justification limited to the protection of business interests (b). Nor is the tort limited, as Sir John Salmond thought (c), to those cases in which the combination is to bring pressure on third persons to cease to deal with or otherwise damnify the plaintiff. If, with the intention of causing damage to A and B, A's servants combine and threaten to leave him unless he ceases to deal with B, and in consequence of this threat he ceases to deal with him, with resulting loss both to himself and to B, both A and B will have a good cause of action (d). And it would appear that this is also the case even though the defendants had no knowledge that their acts were likely to cause damage to A (e).

8. *Terminology.*—Attention should be called to two questions of terminology. The expressions commonly employed in these cases (f) are "conspiracy to injure" and "intent to injure". But such expressions really beg the question at issue. "Injury" is strictly limited to an actionable wrong, in contrast to "damage", which means loss or harm occurring in fact, whether actionable as an injury or not (g). Again in some of the judgments (h) in these cases there is a confusion between "motive" and "intention" and Viscount Simon, L.C., prefers the use of the words "purpose" or "object" (i).

9. *Reason for the rule.*—It is impossible to state dogmatically what is the reason for this anomalous rule that conduct by two may be actionable if it causes damage, whereas the same conduct by one causing the same damage would give no redress, and that motive is in such cases material (k). Lord Wright has suggested (l)

(b) [1942] A. C. pp. 446-7, 462, 478, 492.

(c) 6th ed., p. 575.

(d) Cp. Sir William Erle in 1869 in Memorandum on the Law Relating to Trade Unions, p. 39. See Ferguson, Trade Disputes and Trade Unions Act, 1927, pp. 36-41, and Sargant, J., in *Reynolds v. Shipping Federation*, [1924] 1 Ch. p. 40.

(e) This seems to be implicit in *Sorrell v. Smith*, *supra*, see pp. 710-1.

(f) Cp. Lord Wright in *Crofter Company's Case*, [1942] A. C. pp. 468-71.

(g) S. C. at p. 442, *per* Viscount Simon, L.C. Cp. Lord Wright at p. 469, and Bowen, L.J., in the *Mogul Case* (1889), 23 Q. B. D. p. 612.

(h) *E.g.*, in Lord Dunedin's speech in *Sorrell v. Smith*, [1925] A. C. p. 724.

(i) *Crofter Company's Case*, [1942] A. C. p. 441. Cp. Lord Wright at p. 469.

(k) Cp. *supra*, s. 96 (3) and (4).

(l) *Crofter Company's Case*, [1942] A. C. p. 468. So Holdsworth, H. E. L. viii, pp. 396-397, speaks of "the merit of recognising that there is generally a

that "the common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against injurious combinations was desirable on broad grounds of policy". But, though there is a very serious difference between the oppressive power of a single workman and that of a trade union having ten thousand members, there is no material difference between the power of one workman and that of two. Moreover, it is clear that a single person may by reason of great wealth or influence be able to exercise coercive power over others in a degree exceeding that which is possible even to a large combination of smaller men. As Lord Simon, L.C., said (*m*) in 1941: "The action of a single tyrant may be more potent to inflict suffering on the Continent of Europe than a combination of less powerful persons." Why should the combination be liable, while the single individual of even greater wealth and power goes free? (*n*). Another explanation of the rule is that the action for conspiracy was derived from the crimes of conspiracy developed in the Star Chamber.

*Motive.*—The essence of conspiracy on which a civil action is founded is a criminal conspiracy, though unless actual damage has followed no civil action will lie. The moment that fact is recognised, the spirit of the criminal law, where motive or intention—the *mens rea*—is everything, is introduced (*o*). But, if the above interpretation of the *Crofter Company's Case* is correct, motive is here relevant not in the sense that malice converts an innocent into a wrongful act, but that the otherwise tortious act of combination is not actionable because of a motive recognised by the law as providing a defence. It seems therefore that the historical explanation is hardly satisfactory as a reason for the law as it is now interpreted. A sounder basis for the rule has been suggested (*p*). If it had been held in *Mayor of Bradford v. Pickles* or *Allen v. Flood* that malice had rendered the defendant's act actionable it would have been difficult not to make the principle one of general application so that in every case an inquiry into motive might have become

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danger in concerted action, which is not generally present in individual action—of recognising, in other words, the root principle upon which the whole law of conspiracy rests".

(*m*) *Crofter Company's Case*, [1942] A. C. p. 443. He also made a happy reference to *Cyrano de Bergerac*. Cp. Lords Wright and Porter at pp. 468, 488.

(*n*) Cp. Lord Sumner in *Sorrell v. Smith*, [1925] A. C. pp. 739—741.

(*o*) Cp. Lord Simon, L.C., in *Crofter Company's Case*, [1942] A. C. pp. 443—4; Lord Dunedin in *Sorrell v. Smith*, [1925] A. C. pp. 724—8.

(*p*) By Mr. T. H. Tylor, Fellow of Balliol College.

relevant. Here we have an isolated tort (q), where an otherwise wrongful combination may be excused on the ground that it was committed for an object recognised by the law as justifying it.

10. *The Trade Disputes Act, 1906*.—The common law as to intimidation, boycotting and conspiracy must, in its application to trade unions and industrial warfare, be read subject to the anomalous exceptions established by the Trade Disputes Act, 1906. By section 4 of that Act trade unions have been exempted from all liability for tortious acts. By section 1 it is further provided that “an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable”. Finally by section 3 it is provided that “an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that . . . it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills” (r). “If upon these facts”, said Lord Halsbury (s), speaking of the acts of the defendants in *Quinn v. Leathem*, “the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community.” There is now no remedy.

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(q) As in the case of inducement of breach of contract, *supra*, s. 96.

(r) Strikes and lock-outs declared illegal by the Trade Disputes and Trade Unions Act, 1927, are not protected by the Trade Disputes Act, 1906. *Vide, supra*, s. 14.

(s) [1901] A. C. p. 508.

## CHAPTER XXIII

## WRONGFUL PROCESS OF LAW

In the case of legal proceedings which are erroneous, malicious, or otherwise wrongful it is necessary to consider (1) the liability of the Judges, magistrates, or other judicial officers; and (2) the liability of the parties. We must also distinguish between (1) the liability of the superior Courts, *i.e.*, the Supreme Court, with unlimited jurisdiction, and (2) that of inferior Courts with limited jurisdiction, and again between (3) that of Courts of record and (4) that of Courts not of record. Courts of record include the Supreme Court as well as various inferior Courts. The essential feature of such Courts is that their proceedings can be proved only by their own official record, and that their Judges possess the power to punish for contempt of Court (*a*).

## § 157. Liability of the Superior Courts of Justice

1. *Acts within jurisdiction.*—A Judge of one of the superior Courts is absolutely exempt from all civil liability for acts done by him in the execution of his judicial functions. So long as the jurisdiction of the Court is not exceeded, his exemption from civil liability is absolute, extending not merely to errors of law and fact, but to the malicious, corrupt, or oppressive exercise of his judicial powers (*b*). For it is better that occasional injustice should be done and remain unredressed under the cover of this immunity than that the independence of the judicature and the strength of the administration of justice should be weakened by the liability of magistrates to unfounded and vexatious charges of error, malice, or incompetence brought against them by disappointed litigants. The remedy for judicial errors is some form of appeal to a higher Court, and the remedy for judicial oppression or corruption is a criminal prosecution or the removal of the offending Judge; but in neither case is he called on to defend his judgment in a suit for damages brought against him by an injured litigant.

2. *Acts in excess of jurisdiction.*—When, however, the illegal

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(*a*) Cl. & L. p. 698.

(*b*) *Anderson v. Gorrie*, [1895] 1 Q. B. 668; *Scott v. Stansfield* (1868), L. R. 3 Ex. 220; *Haggard v. Pelicier Frères*, [1892] A. C. 61; *Fray v. Blackburn* (1863), 3 B. & S. 576; *Doswell v. Impey* (1823), 1 B. & C. 163.

act complained of is beyond the limits of the defendant's jurisdiction, it is not definitely settled whether a superior Judge is free from liability; or whether, as in the case of inferior Judges, he is civilly responsible for such an excess of jurisdiction. This much is clear. In order to establish exemption, as regards proceedings in an inferior Court the Judge must prove that he had jurisdiction (c), whereas the plaintiff must prove want of jurisdiction in the case of proceedings in a superior Court (d). Subject to this it seems probable that the liability of superior and inferior Judges is the same (e). "The principle of the law on this matter is plain. If a judicial officer acts outside his jurisdiction he is not acting as a judicial officer at all, and he is in no better position than any one else" (f). So it is well settled that the protection accorded to judicial acts is not extended to ministerial acts of a judicial officer (g).

### § 158. Liability of Inferior Courts of Justice

1. *Inferior Courts of record*.—Judges of an inferior Court of record possess the same immunity as Judges of the superior Courts so long as they do not exceed their jurisdiction.

2. *Justices of the Peace*.—Probably a similar immunity is possessed even by those inferior Courts which are not Courts of record (h). There are many *dicta*, however, to the effect that Justices of the Peace (and therefore, presumably, other judicial officers whose Courts are not of record) are liable for the malicious exercise of their judicial powers even within the limits of their jurisdiction (i). Section 1 of the Justices' Protection Act, 1848, seems to assume that this is the law; for it provides that any action against a Justice of the Peace for an act done within the

(c) *Carratt v. Morley* (1841), 1 Q. B. 18.

(d) *Peacock v. Bell* (1667), 1 Saund. 73.

(e) *Case of the Marshalsea* (1612), 10 Rep. 68 b, 76 a; *Anderson v. Gorrie*, [1895] 1 Q. B. 668. So Winfield, *Present Law*, p. 211. But Sir John Salmond thought that in the case of superior Judges the exemption was absolute, and cited in support *Miller v. Seare* (1777), 2 W. Bl. p. 1145, *per De Grey, C.J.*; *Taaffe v. Downes* (1812), 3 Moore P. C. 36 n.; and opinion in the U.S.A. (*Am. and Eng. Encyc. of Law*, xvii, p. 728, 2nd ed.). And *vide infra*, s. 158 (3). The point is academic rather than practical.

(f) *Palmer v. Crone*, [1927] 1 K. B. p. 808, *per Talbot, J.*

(g) *Ferguson v. Earl of Kinnoull* (1842), 9 Cl. & F. pp. 312—313, *per Lord Campbell*.

(h) See *Haggard v. Pelicier Frères*, [1892] A. C. 61.

(i) *Cave v. Mountain* (1840), 1 M. & G. p. 263; *Linford v. Fitzroy* (1849), 13 Q. B. p. 247; *Burley v. Bethune* (1814), 5 Taunt. 580; *Taylor v. Nesfield* (1854), E. & B. p. 780.

limits of his jurisdiction shall be an action on the case as for a tort, and that it shall be necessary to prove malice and the absence of reasonable and probable cause. There is, however, no case in which any such action has been maintained, and it would seem difficult to justify any such distinction between different classes of magistrates. The trend of recent opinion seems definitely against any such distinction (*k*).

3. *Inferior Courts liable for exceeding their jurisdiction.*—A Judge of an inferior Court is civilly liable for any act done by him in excess of his jurisdiction and in the nature of a trespass against the person or property of the plaintiff or otherwise a cause of damage to him. Such a Judge determines the limits of his own jurisdiction at his own peril, and (speaking generally) he will answer for any mistake; nor is it necessary for the plaintiff to prove any malice or want of reasonable or probable cause. The decision of an inferior Judge that he possesses jurisdiction is not conclusive in his own favour; it does not lie within his jurisdiction to determine authoritatively the limits of it. His duty is to observe those limits, not to exercise the judicial function of deciding what they are. A superior Court, on the other hand, is intrusted with the power of determining its own jurisdiction, and is no more answerable for a judicial error on this point than for a judicial error on any other.

4. *Meaning of excess of jurisdiction.*—The distinction thus drawn between an excess of a magistrate's jurisdiction and a wrongful act within the limits of his jurisdiction is one which it is easier to state in general terms than to define with accuracy or apply with precision (*l*). It may probably be said with truth, however, that a magistrate may exceed his jurisdiction in three ways:

- (a) When he has no power to deal with the kind of matter brought before him: as when a single Justice of the Peace makes an order which should be made by two.
- (b) When he has no power to deal with the particular person concerned: for example, because that person has not been

(*k*) *Law v. Llewellyn*, [1906] 1 K. B. 487; *Everett v. Griffiths*, [1921] 1 A. C. p. 666. The point is considered, but left open, in *Gelen v. Hall* (1857), 2 H. & N. 379. See Winfield, *Present Law*, pp. 216—219.

(*l*) See on the whole of this topic the exhaustive articles by D. M. Gordon: *The Relation of Facts to Jurisdiction*, 45 L. Q. R. 459; *The Observance of Law as a Condition of Jurisdiction*, 47 L. Q. R. 386, 557.

properly summoned before him (m), or is not resident within the local jurisdiction of the Court (n).

- (e) When, although there is jurisdiction over the matter and the person, the judgment or order given or made in the matter is of a kind which the magistrate has no power to give or make: as if he imprisons instead of fining, or imprisons for a longer period than the law permits (o).

In all these cases the magistrate is liable as for an excess of jurisdiction. When, on the other hand, he has power to give the kind of judgment which he has given, against the person complaining of it, he is not liable merely because his judgment is erroneous in law or in fact (p), or because there has been some irregularity of procedure (q). Such an error or irregularity is merely a wrongful exercise of jurisdiction, not an excess of it.

Thus, in *Cave v. Mountain* (r), Justices of the Peace were held not liable for imprisoning the plaintiff on insufficient and legally inadmissible evidence. A decision upon the evidence is within the jurisdiction of the magistrate who has jurisdiction to hear the case.

5. *Distinction between mistake of law and of fact.*—When a magistrate exceeds his jurisdiction by reason of a mistake of law, his liability is absolute, being independent of any malice or negligence. He is bound at his peril to know the law as to his own powers (s). When, on the other hand, his mistake is one of fact, he is not liable unless he either knew or ought to have known the facts which deprived him of jurisdiction. There must, in other words, be either knowledge of the want of jurisdiction or an absence of any reasonable and probable cause for believing that jurisdiction existed (t). Thus, if a magistrate imprisons a person

(m) This is doubted by Gordon, 47 L. Q. R. pp. 579—582.

(n) *Carratt v. Morley* (1841), 1 Q. B. 18; *Mitchell v. Foster* (1840), 12 A. & E. 472; *Caudle v. Seymour* (1841), 1 Q. B. 889; *Jones v. Gurdon* (1842), 2 Q. B. 600; *Houlden v. Smith* (1850), 14 Q. B. 841.

(o) *Prickett v. Gratrex* (1846), 8 Q. B. 1020.

(p) *Brittain v. Kinnaird* (1819), 1 B. & B. 492; *Linford v. Fitzroy* (1849), 13 Q. B. 240.

(q) *Bott v. Ackroyd* (1859), 28 L. J. M. C. 207; *Penney v. Slade* (1839), 5 Bing. N. C. 319.

(r) (1840), 1 M. & G. 257. Cp. *Brittain v. Kinnaird* (1819), 1 B. & B. 492; *Garnett v. Ferrand* (1827) 6 B. & C. 611; *R. v. Lincolnshire JJ.*, [1926] 2 K. B. 192; *Linford v. Fitzroy* (1849), 13 Q. B. 240.

(s) *Houlden v. Smith* (1850), 14 Q. B. 841.

(t) *Pease v. Chaytor* (1861), 1 B. & S. 658; 3 B. & S. 620; *Calder v. Halket* (1839), 3 Moore P. C. 28; *Polley v. Fordham*, No. 2 (1904), 91 L. T. 525; *Palmer v. Crone*, [1927] 1 K. B. 804. In the last-mentioned case Talbot, J., said (at p. 810) that knowledge or means of knowledge was limited to knowledge or means



who by reason of his residence outside the district of the Court is not subject to his jurisdiction, he is liable if the mistake is one of law, but not liable if it is an excusable mistake of fact (*u*) (*v*) (*x*).

### § 159. Malicious Prosecution and other Malicious Process

1. Having considered the liability of magistrates and Judges in the case of wrongful legal proceedings, it remains to deal with the liabilities of the parties to these proceedings. This matter must be considered under two heads—(1) malicious proceedings, and (2) erroneous and irregular proceedings.

2. *Kinds of malicious proceeding for which an action lies.*—It is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause (*y*). The chief classes of proceedings to which this rule of liability applies are the following :—

(a) *Malicious criminal prosecutions.*—It is the wrong known as malicious prosecution to institute criminal proceedings against any one, if the prosecution is inspired by malice and is destitute of any reasonable cause. It is not every kind of criminal prosecution, however, which falls within this rule (*z*). The rule applies only to prosecution which involve scandal—that is to say, which attack the fair fame of the accused—or which may result in a sentence of imprisonment or other corporal punishment, or which in fact cause pecuniary loss to the accused (*a*). A charge which is not scandalous

of knowledge which a magistrate has in his judicial capacity, that is, based on materials regularly before him. A Judge therefore can neglect statements not made before him on oath.

(*u*) *Houlden v. Smith* (1850), 14 Q. B. 841.

(*w*) A judicial officer who in the particular instance acts in a merely ministerial capacity—in the performance of a ministerial duty as opposed to the exercise of a judicial discretion—is liable in the same manner as any other ministerial officer, and derives no protection from his judicial character.

(*x*) The liability of justices of the peace for their judicial acts is modified by certain statutory provisions contained in the Justices' Protection Act, 1848.

(*y*) For the history of this action, which is derived from the old action upon the case in the nature of conspiracy, see Winfield, *History of Conspiracy*, pp. 118—130, and Holdsworth, *H. E. L.* viii, 385—391. There is a clear and accurate statement of the law at the present day in Winfield, *Present Law*, pp. 174—204.

(*z*) It is uncertain whether such an action can be brought against a naval or military officer for the institution of proceedings before a court-martial. In *Sutton v. Johnstone* (1786), 1 T. R. pp. 510, 784, and *Dawkins v. Rokeby* (1866), 4 F. & F. pp. 832, 833, it was held *obiter* that it could not, but in *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116, the House of Lords held that the question was still open in that House.

(*a*) *Wiffen v. Bailey and Romford Urban Council*, [1915] 1 K. B. 600; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674.

in its nature, and which can result in a fine only, cannot therefore be made the grounds of an action for malicious prosecution unless it causes actual pecuniary loss; *e.g.*, a prosecution for the breach of a by-law in allowing one's cattle to stray upon a highway (*b*). The scandalous nature of a charge must be determined by reference to the legal nature of the offence charged, and not by reference to the nature of the evidence produced at the trial (*c*). With respect to proof of pecuniary loss it is to be observed that the difference between party and party costs and solicitor and client costs is not recognisable as legal damage (*d*). In prosecutions, therefore, in which costs are recoverable by the accused, the additional costs incurred by him cannot be made the grounds of an action (*e*).

(*b*) *Malicious bankruptcy and liquidation proceedings*.—A similar liability attaches to him who maliciously and without reasonable cause petitions to have another person adjudicated a bankrupt (*f*), or to have a company wound up as insolvent (*g*).

(*c*) *Malicious arrest*.—Similarly it is an actionable injury to procure the arrest and imprisonment of the plaintiff by means of judicial process, whether civil or criminal, which is instituted maliciously and without reasonable cause. Thus, in *Churchill v. Siggers* (*h*) the plaintiff was a debtor against whom judgment had been duly obtained by the defendant, and who, although he had paid part of the judgment debt, was arrested by the creditor on a writ of *capias ad satisfaciendum* issued for the full amount of the debt. It was held that the plaintiff had a good cause of action for such an abuse of legal process. This species of wrong is to be distinguished from false imprisonment. False imprisonment is the act of the defendant himself or of a merely ministerial officer put in motion by him. Under the old practice the appropriate remedy was a writ of trespass, and, speaking generally, neither malice nor want of reasonable and probable cause was or is required. But in malicious arrest the imprisonment is effected by or in pursuance of the valid order or judgment of a Judge or magistrate; no action of trespass would lie; the remedy was in case for wrongfully

(*b*) *Wiffen v. Bailey and Romford Urban Council*, [1915] 1 K. B. 600.

(*c*) *Wiffen v. Bailey and Romford Urban Council*, [1915] 1 K. B. p. 611, *per* Phillimore, L.J.; p. 614, *per* Pickford, L.J.

(*d*) See Odgers, *Pleading*, p. 363 (11th ed.).

(*e*) *S. C.*; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674.

(*f*) *Johnson v. Emerson* (1871), L. R. 6 Ex. 329.

(*g*) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674.

(*h*) (1854), 3 E. & B. 929.

abusing the process of the Court; and there was and is no cause of action except on proof of malice and want of reasonable cause (i).

(d) *Malicious execution against property*.—On the same principle it is an actionable wrong maliciously and without reasonable and probable cause to issue execution against the property of a judgment debtor (k). .

3. *Ordinary civil actions*.—The bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious, and malicious it may be (l). The reason alleged for this rule is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law can take notice. Even for the injury which baseless accusations made in a civil action may inflict upon the reputation of the defendant, it would seem that no action lies. It seems that a litigant may maliciously and without any reasonable ground make the gravest charges of fraud or other disgraceful conduct without incurring any other liability than that of paying the costs of the proceedings.

To what classes of civil proceedings this rule of exemption applies is far from clear. Will an action lie at the suit of a person maliciously joined as a co-respondent in a divorce suit, or at the suit of a person against whom affiliation proceedings have been maliciously taken, or at the suit of a solicitor whom the defendant has maliciously endeavoured to have struck off the roll? If malicious proceedings in bankruptcy are, as we have seen, a good cause of action, there seems no reason why a similar conclusion should not be drawn with respect to the proceedings mentioned (m).

4. *Conditions of liability*.—In order that an action shall lie for malicious prosecution or the other forms of abusive process which

(i) Since the abolition of arrest on mesne process, the grounds for such an action are not likely to arise, but it is still conceivable in one or two cases. Winfield, *Present Law*, p. 203.

(k) *Churchill v. Siggers* (1854), 3 E. & B. p. 937; cp. *Clissold v. Cratchley*, [1910] 2 K. B. 244. In this case execution was issued in ignorance of the fact that the judgment had already been fully satisfied, and an action of trespass was held to lie without proof of malice. The cause of action was the unlawful issue of void process, not the malicious abuse of valid process.

(l) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. p. 689, per Bowen, L.J.: "The bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable and probable cause and with malice, gives rise to no ground of complaint". Cp. *Corbett v. Burge* (1932), 48 T. L. R. 626.

(m) As a matter of history there is no reason why such an action should not lie, but the law now probably is that it will not. Winfield, *Present Law*, p. 202.

have been referred to, there are the following conditions to be fulfilled :—

- (a) The proceedings must have been instituted by the defendant;
- (b) He must have acted without reasonable and probable cause;
- (c) He must have acted maliciously;
- (d) In certain classes of cases the proceedings must have been unsuccessful—that is to say, must have terminated in favour of the plaintiff now suing.

We shall deal with these requirements in their order.

5. *Institution of proceedings.*—The proceedings complained of by the plaintiff must have been instituted by the defendant—that is to say, he must be the person who put the law in motion against the plaintiff. It is not necessary, however, that he should be a party to the proceedings. Thus, an action for malicious abuse of process will lie against the solicitor who in his client's name has set the law in motion against the plaintiff (n). So in the case of malicious prosecution by way of indictment in the name of the King, the person liable is the prosecutor to whose instigation the proceedings are due. Instigating a prosecution is to be distinguished, however, from the act of merely giving information on the strength of which a prosecution is commenced by some one else in the exercise of his own discretion (o).

6. *Want of reasonable and probable cause.*—No action will lie for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause (p). Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. "I should define reasonable and probable cause", said Hawkins, J., in *Hicks v. Faulkner* (q), "to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to

(n) *Johnson v. Emerson* (1871), L. R. 6 Ex. 329; *Gilding v. Eyre* (1861), 10 C. B. (N.S.) 592.

(o) *Cohen v. Morgan* (1825), 6 D. & R. 8; *Fitzjohn v. Mackinder* (1860), 8 C. B. (N.S.) 78; *Dubois v. Keats* (1840), 11 A. & E. 329.

(p) *Willans v. Taylor* (1829), 6 Bing. p. 186.

(q) (1878), 8 Q. B. D. p. 171.

the conclusion that the person charged was probably guilty of the crime imputed" (r) (s).

7. *Burden of proof*.—The burden of proving the absence of reasonable and probable cause lies upon the plaintiff. It is not for the defendant to prove affirmatively as a defence that reasonable and probable cause existed. If, therefore, there is no sufficient evidence of the absence of such cause, judgment must be given for the defendant (t).

8. *No reasonable cause without honest belief*.—There is no reasonable and probable cause unless the defendant genuinely and honestly believed that the prosecution, or other proceeding complained of, was justifiable. "It would be a monstrous proposition that a party who did not believe the guilt of the accused should be said to have reasonable and probable cause for making the charge" (u). Even, however, if the defendant honestly believed the proceedings to be justified, there is no reasonable and probable cause unless this belief is based on reasonable grounds. This question is to be determined by reference to the facts actually known to the defendant at the time when he laid the information and subsequently proceeded with the prosecution (w), not to the facts as they actually existed. He who prosecutes when the facts known to him do not constitute reasonable and probable cause cannot defend himself, in an action for malicious prosecution, on the ground that there were other facts unknown to him which would have justified a prosecution (x). Conversely, facts unknown to the prosecutor do not prevent the facts which were known to him from constituting reasonable and probable cause (y). Having regard, however, to the facts known to the defendant, he must show a

(r) Lord Atkin in a judgment concurred in by the other members of the Court said he knew of no better statement than this: *Herniman v. Smith*, [1938] A. C. p. 316. See also *Broad v. Ham* (1839), 5 Bing. N. C. 722; *Turner v. Ambler* (1847), 10 Q. B. 252; *McArdle v. Egan* (1933), 150 L. T. 412.

(s) In the phrase *reasonable and probable cause* the terms *reasonable* and *probable* are mere synonyms. Sir John Salmond (9th ed., s. 159 (6), n. (z), had a long and profitable note on this use of the term *probable* which he described as one of the archaisms of legal diction. See also C. K. Allen in 54 L. Q. R. pp. 15-6.

(t) *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 440; 11 A. C. 247. *Aliter* in an action of false imprisonment: *Hicks v. Faulkner* (1878), 8 Q. B. D. p. 170.

(u) *Broad v. Ham* (1839), 5 Bing. N. C. p. 727.

(w) *Herniman v. Smith*, [1938] A. C. p. 315; cp. *S. C.*, [1936] 2 A. E. R. p. 1886, per Greene, L.J.

(x) *Delegal v. Hightley* (1837), 3 Bing. N. C. 950; *Turner v. Ambler* (1847), 10 Q. B. 252.

(y) *Herniman v. Smith*, [1938] A. C. 305.

reasonably sound judgment and use reasonable care in determining whether there are sufficient grounds for the proceedings instituted by him, and any failure to exhibit such judgment or care will be imputed to him as a want of reasonable and probable cause (z). It may be inferred from *Herniman v. Smith* (a), where the point was allowed to go by default, that it is not enough in itself to establish a reasonable and probable cause that the plaintiff was committed for trial or even that he was convicted by a Court of first instance and subsequently acquitted on appeal. This seems good sense, for, though these facts would be weighty evidence of a reasonable and probable cause (b), they should not be conclusive. The original conviction might have been obtained as a result of the prosecutor's own fraud or of evidence of which he was unaware.

9. *Reasonable cause a question for the Judge.*—The existence of reasonable and probable cause is a question for the Judge, and not for the jury (c). This rule, however, is subject to the qualification that all preliminary questions of fact on which this ultimate issue depends are for the jury. That is to say, the jury must find what the facts of the case were, as known to or believed by the defendant, and then the Judge decides whether those facts constituted reasonable and probable cause—viz., whether the defendant showed reasonable care and judgment in believing and acting as he did.

Thus, if the defendant alleges that he prosecuted the plaintiff because of certain information received from a third person, it is for the jury to say whether that information was really received by the defendant and whether it was really believed by him, and it is for

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(z) The circumstance that the mistake of the defendant is one of law and not of fact does not necessarily amount to proof of want of reasonable and probable cause. The duty of a prosecutor is merely to show due judgment, care, and discretion as to the guilt of the accused in law no less than in fact: *Phillips v. Naylor* (1859), 4 H. & N. 565. As to the protection afforded by the opinion of counsel, see *Ravenga v. Mackintosh* (1824), 2 B. & C. 693. "If a party", said Bayley, J., "lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description."

(a) [1938] A. C. 305. See *Winfield* in 53 L. Q. R. 12.

(b) S. C., [1936] 2 A. E. R. p. 1383.

(c) *Panton v. Williams* (1841), 2 Q. B. 169; *Lister v. Perryman* (1870), L. R. 4 H. L. 521. So also in actions of false imprisonment: *Hailes v. Marks* (1861), 7 H. & N. 56. This anomalous rule was established as a precaution against erroneous verdicts for the plaintiff—*per doubt del lay gents*. Reasonable and probable cause was withdrawn from the cognisance of juries, under the pretence that it was a question of law. The old practice was to plead specially the facts relied on as constituting reasonable and probable cause, and the sufficiency of them was determined on demurrer: *Pain v. Rochester* (1602), Cro. Eliz. 871.

the Judge to decide whether, if it was so received and believed, it constituted a reasonable ground for the prosecution (d).

This division of functions between Judge and jury may be effected at the discretion of the Judge in two ways. He may either direct the jury to find the facts specially, and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be such and such, then there is reasonable and probable cause, and that if they find the facts to be otherwise there is none, thus leaving the jury to find a general verdict on this hypothetical direction (e) (f).

10. *Malice*.—No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously—that is to say, from some wrongful motive (g). Malice and absence of reasonable and probable cause must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability.

Malice means the presence of some improper and wrongful motive—that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose. “Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing

(d) *Panton v. Williams* (1841), 2 Q. B. 169; *Lister v. Perryman* (1870), L. R. 4 H. L. 521; *Herniman v. Smith*, [1938] A. C. pp. 316–7.

(e) *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. at p. 458, *per* Bowen, L.J.

(f) In some cases the question has been left to the jury whether the defendant took reasonable care to ascertain the facts: *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 79; 11 A. C. 247; *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Herniman v. Smith*, [1938] A. C. 305, 314. In the last-named case, at pp. 316–7, Lord Atkin, in accordance with the view of Sir John Salmond, held that in many cases to ask such a question is to ask the jury what the Judge has to decide for himself, and is to take the decision of the issue out of the hands of the Judge to whom in the interests of prosecutor and accused alike it has been confided. *Cp.* Cave, J., in *Brown v. Hawkes*, [1891] 2 Q. B. p. 720. It is impossible to distinguish the question whether the defendant showed reasonable care and judgment in ascertaining the facts, from the question whether he showed reasonable care and judgment in estimating the significance of the facts known to him, and both questions are equally for the Judge. See *Abrath v. N. E. Ry.* (1886), 11 A. C. at p. 254, *per* Lord Bramwell; *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K. B. 527.

(g) *Williams v. Taylor* (1829), 6 Bing. p. 186.

that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor" (h).

A prosecution is malicious only if it is animated by a desire to use the criminal law for some purpose for which it is not intended: for example, the conviction or defamation of an innocent man, the levying of blackmail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution from the accused (the civil law, not the criminal, being the appropriate instrument for this purpose). A prosecution is not malicious merely because inspired by anger for the injury suffered. "It may, I think, be assumed", says Cave, J., in *Brown v. Hawkes* (i), "that the defendant was angry; but so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law."

11. *Burden of proof*.—The burden of proving malice lies on the plaintiff; and, subject to two qualifications, the question is one for the jury and not, like that of reasonable and probable cause, one for the Judge (k). The first of these qualifications is that the question whether any particular motive is a proper or improper motive for the proceeding in question is a matter of law for the determination of the Judge. Malice is any motive of which the law disapproves, not any motive which is displeasing to a jury. The jury has merely to decide whether the motive exists. The second qualification is that there must be some reasonable evidence of malice, otherwise the case will be withdrawn from the jury (l).

*Evidence of malice*.—Want of reasonable and probable cause is itself in certain cases sufficient evidence of malice to go to a jury. For "there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice" (m). Nevertheless, a jury is not at liberty in all cases to infer malice from want of reasonable cause. Want of reasonable cause is sufficient evidence of malice in those cases only in which

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(h) *Brown v. Hawkes*, [1891] 2 Q. B. at p. 722. See also *Mitchell v. Jenkins* (1883), 5 B. & Ad. at p. 695; *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. p. 455.

(i) [1891] 2 Q. B. p. 722.

(k) *Mitchell v. Jenkins* (1883), 5 B. & Ad. 588.

(l) *Brown v. Hawkes*, [1891] 2 Q. B. 718.

(m) *S. C.*, p. 723.



it is sufficient evidence that there was no genuine belief in the accusation made. If it appears that there was such a belief, the plaintiff must produce some independent evidence of malice, and cannot rely on the absence of reasonable cause. On the other hand, malice is never evidence of want of reasonable cause. "From the most express malice, the want of probable cause cannot be implied" (*n*). For a prosecutor may be inspired by malice and yet have a genuine and reasonable belief in the truth of his accusation.

12. *Termination of the proceedings in favour of the plaintiff.*—No action for a malicious prosecution, or for any other malicious proceeding which involves a judicial decision of any question at issue between the parties, will lie until or unless the prosecution or other proceeding has terminated in favour of the person complaining of it. No person, for example, who has been convicted on a criminal charge can sue the prosecutor for malicious prosecution, even though he can prove that he is an innocent man, and that the accusation was a malicious and unfounded one (*o*). Even if the prosecution or other proceeding is still pending, the same rule applies. "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust" (*p*).

If the prosecution has actually determined in any manner in favour of the plaintiff, it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt. Thus, it is enough if the prosecution has been discontinued (*q*), or if the accused has been acquitted by reason of some formal defect in the indictment (*r*), or if a conviction has been quashed (*s*), even if for some technical defect in the proceedings (*t*).

13. *Aliter in proceedings involving no judicial decision.*—This rule that the proceedings must not be still pending, but must have terminated in favour of the plaintiff in the subsequent action,

(*n*) *Johnstone v. Sutton* (1786), 1 T. R. p. 544.

(*o*) *Basebè v. Matthews* (1867), L. R. 2 C. P. 684; *Castrique v. Behrens* (1860), 3 E. & E. 709.

(*p*) *Gilding v. Eyre* (1861), 10 C. B. (N.S.) p. 604.

(*q*) *Watkins v. Lee* (1839), 5 M. & W. 270.

(*r*) *Wicks v. Fentham* (1791), 4 T. R. 247.

(*s*) *Herniman v. Smith*, [1938] A. C. 305, 315. *Vide supra*, s. 159 (*8*).

(*t*) See *Johnson v. Emerson* (1871), L. R. C Ex. at p. 394.

applies not only to malicious prosecution, but to all malicious proceedings which involve the judicial determination of any question at issue. Thus, no action will lie for maliciously procuring the plaintiff to be adjudicated a bankrupt, until and unless the adjudication has been set aside (*u*). But the rule does not apply to proceedings which involve no such judicial decision. Thus, in *Gilding v. Eyre* (*w*) it was held that an action would lie for maliciously issuing a *ca. sa.* for a larger sum than remained due on the judgment, and that it was unnecessary to show that the execution had been set aside. The plaintiff in instituting his action for such a cause raised no question which had already been decided against him in a Court of Justice (*x*).

### § 160. Erroneous and Irregular Proceedings

1. *No liability for procuring an erroneous decision.*—Having considered the liability of litigants for the malicious abuse of legal process, it remains to consider how far they are responsible for mere errors and irregularities of procedure in the absence of any malice.

2. No action will lie against any person for procuring an erroneous decision of a Court of Justice. This is so even though the Court has no jurisdiction in the matter, and although its judgment or order is for that or any other reason invalid. A Court of Justice is not the agent or servant of the litigant who sets it in motion, so as to make that litigant responsible for the errors of law or fact which the Court commits. Every party is entitled to rely absolutely on the presumption that the Court will observe the limits of its own jurisdiction and decide correctly on the facts and the law.

Thus, in *Lock v. Ashton* (*y*) the defendant had wrongly, though honestly, arrested the plaintiff and charged him with an offence before a magistrate, who thereupon remanded him in custody. It was held that, although the defendant was liable for the original arrest (as being his own wrongful act), he was not responsible for the subsequent remand, which was merely an erroneous act of the magistrate. In *Brown v. Chapman* (*z*) it is said: "If an individual prefers a complaint to a magistrate, and procures a warrant to be

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(*u*) *Metropolitan Bank v. Pooley* (1885), 10 A. C. 210. See also *Huffer v. Allen* (1866), L. R. 2 Ex. 15.

(*w*) (1861), 10 C. B. (N.S.) 592.

(*x*) See also *Stewart v. Gromett* (1859), 7 C. B. (N.S.) 191.

(*y*) (1848), 12 Q. B. 871.

(*z*) (1848), 6 C. B. p. 376.

granted, upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment; and that even though the magistrate has no jurisdiction. . . . The imprisonment is referred to the magistrate's authority, so as to exempt the complainant from all liability in trespass" (a).

3. *No liability for acting on erroneous decision.*—No action will lie against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a Court of Justice, even though it is erroneous, and even though it is afterwards reversed or set aside for error. A valid judgment, however erroneous in law or fact, is a sufficient justification for any act done in pursuance of it. The remedy of an aggrieved litigant is some form of appeal whereby the judgment may be reversed or set aside, not an action for damages against those who enforce or act on the judgment while it stands.

Thus, in *Williams v. Smith* (b) the defendant was held not liable for imprisoning the plaintiff on a writ of attachment which was subsequently set aside on appeal. "Where he relies upon the judgment of a competent Court, however erroneous that judgment may be, the party acting upon the faith of it ought to be protected" (c).

4. *Aliter with the execution of process which is invalid.*—If any litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity, or any other reason, and in so doing he commits any act in the nature of a trespass to person or property, he is liable therefor in an action of trespass, and it is not necessary to prove any malice or want of reasonable or probable cause. This is an application of the fundamental principle that mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another. A supposed justification is no justification at all. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process, and any irregularity or error which has the effect of making the process invalid will deprive him of all justification. Thus, in *Painter v. Liverpool Oil Gas Light Co.* (d), Justices of the Peace, on the application of the defen-

(a) See also *West v. Smallwood* (1838), 3 M. & W. 418; *Austin v. Dowling* (1870), L. R. 5 C. P. 534; *Harniman v. Smith*, [1938] A. C. p. 311.

(b) (1863), 14 C. B. (N.S.) 596.

(c) (1863), 14 C. B. (N.S.) p. 625. Cp. *Smith v. Sydney* (1870), L. R. 5 Q. B. 203; *Williams v. Williams*, [1937] 2 A. E. R. 559.

(d) (1836), 3 A. & E. 433. Contrast *L. C. C. v. Hackney B. C.*, [1926] 2 K. B. 588.

dants, issued a warrant of distress without jurisdiction, and the defendants were held liable in damages.

5. *Void and voidable process*.—When it is sought to hold a litigant thus liable for the execution of invalid process, a distinction is to be drawn between process which is wholly void and process which is merely voidable. Process which is void is no defence at all, and an action will lie without taking any steps to set it aside (e). But when process is merely voidable, it is a sufficient justification until it has been set aside; though when it has been set aside it becomes void *ab initio*, and an action will thereupon lie for acts done in pursuance of it. “The process when set aside is as if it had never existed, and . . . the party therefore cannot justify under it” (f).

### § 161. Maintenance and Champerty (g)

1. *Maintenance defined*.—To procure any person by means of pecuniary assistance, or possibly in other ways (h), to institute, carry on, or defend civil proceedings is, in the absence of lawful justification, a wrong actionable at the suit of the other party to those proceedings (i). This wrong is known as that of maintenance. “The essence of the offence is intermeddling with litigation in which the intermeddler has no concern” (k).

Thus, in *Bradlaugh v. Newdegate* (l) the plaintiff had been unsuccessfully sued in a former action brought by one Clarke for the recovery of the statutory penalty for sitting and voting in Parliament without having taken the necessary oath. Clarke was a person of no means, and was unable to pay the plaintiff's costs. The action had been instigated and procured by the defendant Newdegate, who had supplied the necessary funds and had given Clarke a guarantee against all expenses. It was held that the plaintiff was entitled to recover from the defendant, on the ground

(e) *Brooks v. Hodgkinson* (1859), 4 H. & N. 712.

(f) *Codrington v. Lloyd* (1839), 8 A. & E. p. 453. See *Riddell v. Pakeman* (1885), 2 C. M. & R. 30; *Blanchenay v. Burt* (1843), 4 Q. B. 707. Whether any particular irregularity makes process wholly void or only voidable is a question pertaining to the details of the procedure of the Court in question. As to the High Court, see Order 70, Rule 1.

(g) For the history of these torts, see Winfield, *History*, Ch. 6; Holdsworth, *H. E. L.* iii, 395–399, viii, 397–402. For a full treatment of the present law, see Winfield, *Present Law*, Ch. 1.

(h) See Winfield, *Present Law*, pp. 19–21.

(i) *Neville v. London Express Newspaper, Ltd.*, [1919] A. C. 368.

(k) *Ibid.*, p. 385, per Lord Finlay.

(l) (1883), 11 Q. B. D. 1. Cp. *Alabaster v. Harness*, [1895] 1 Q. B. 339.

of unlawful maintenance, all the costs which he had incurred in the action brought against him by Clarke.

2. *Proceedings maintained must be civil.*—The doctrine of maintenance applies solely to the instigation of *civil* proceedings. To set the criminal law in motion is the right of every member of the public, and is not actionable unless those conditions of liability exist which are required by the law of malicious prosecution (m).

3. *Justification for maintenance.*—It is a sufficient justification for what would otherwise be unlawful maintenance, that the defendant has or believes himself to have some lawful interest in the subject-matter of the suit maintained by him. Thus, co-owners of property, or a landlord and his tenant, may maintain one another in the defence of their common interests. Maintenance is the offence of promoting litigation with which one has no concern (n).

4. *Charitable motives.*—It is also a sufficient justification that the defendant was actuated solely by charitable motives—i.e., by a desire to assist a poor man to obtain justice that would otherwise be beyond his reach. If this was his honest purpose, there is no actionable maintenance, even though there was no reasonable and probable cause for bringing the action which he thus instigated (o).

5. *Champerty.*—Champerty (*campi partitio*) is that form of maintenance in which the person maintaining takes as his reward a portion of anything which may be gained as a result of the proceedings. Thus a solicitor who conducts proceedings on the basis of payment proportioned to the amount recovered is guilty of the criminal offence of champerty, and is liable to a civil action (p). Charitable motives are no defence to proceedings for champerty. "Charity may be indiscreet, but must not and, indeed, cannot be mercenary" (q).

6. *Other justifications.*—There may be other justifications for maintenance in addition to the two already mentioned, but it is

(m) *Grant v. Thompson* (1895), 72 L. T. 264.

(n) *Findon v. Parker* (1843), 11 M. & W. 675; *Guy v. Churchill* (1888), 40 Ch. D. 481; *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. at p. 11; *Alabaster v. Harness*, [1895] 1 Q. B. 399; *British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co.*, [1908] 1 K. B. 1006; *Oram v. Hutt*, [1914] 1 Ch. 98. See also *Street, Ultra Vires*, pp. 248, 254-5.

(o) *Harris v. Brisco* (1886), 17 Q. B. D. 504; *Holden v. Thompson*, [1907] 2 K. B. 489. As to solicitors acting for poor persons, see *Wiggins v. Lavy* (1928), 44 T. L. R. 721 and 51 L. Q. R. 575.

(p) *Haseldine v. Hosken*, [1933] 1 K. B. 822.

(q) *Cole v. Booker* (1913), 29 T. L. R. 295, *per* Bailhache, J.

impossible to say what they are. The modern law of maintenance is the atrophied survival of what in earlier days was a far-reaching and important branch both of the civil and criminal law, and we cannot say with certainty how much of the old doctrine is still living and operative. The older authorities are no longer to be relied upon, and modern authority is scanty (r).

7. *Maintenance of successful proceedings*.—It is no defence to an action for maintenance that the maintained proceedings were successful and therefore justifiable (s). The common law does not approve of the intervention of any man in the litigation of another with which he has no lawful concern, whether that litigation is well founded or not.

8. *Maintenance not actionable without proof of actual damage*.—The wrong of maintenance is not actionable *per se* but only on proof of actual damage (t). Where the maintained proceedings were successful, the resulting liability of the other party to pay the amount of the judgment against him, or to pay his own costs in defending a good claim against him, or in instituting an unfounded claim against another, is not regarded by the law as amounting to legal damage for which he can recover compensation against the maintainer (t). This rule would seem to deprive of practical importance the rule that a man is responsible for maintaining successful litigation. So in *Neville v. London Express Newspaper, Ltd.* (u) the defendants had assisted persons who had been defrauded by the plaintiff in connection with sales at New Anzac-on-Sea (now Peacehaven) to recover their moneys in an action. They had helped to get justice done. Would an action for maintenance lie against them? Two logical answers were possible. Lord Atkinson and Lord Haldane held that every subject has a legal right not to be harried in Courts of justice by maintained actions brought by officious intermeddlers who have no legitimate interest in their subject-matter, that therefore even if the plaintiff has lost nothing, “no not so much as a little diachylon”, he will still have his action for nominal damages on the principle of *Ashby v.*

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(r) Winfield, *Present Law*, pp. 21—84, gives the following additional justifications: (1) professional legal assistance; (2) possibly, kinship; (3) possibly, the relationship of master and servant.

(s) *Neville v. London Express Newspaper, Ltd.*, [1919] A. C. 368.

(t) *Ibid.*; *Wiggins v. Lavy* (1928), 44 T. L. R. 721; *Siewwright v. Ward* [1935] N. Z. L. R. 43. See 51 L. Q. R. p. 575.

(u) [1919] A. C. 368.

*White (w)*. Lord Shaw and Lord Phillimore with equal logic held that maintenance is only actionable if it is to the hindrance or disturbance of common right, to the delay or distortion or withholding of justice and that the plaintiff must have suffered actual injury therefrom. Where the action maintained has succeeded, justice is not denied, the plaintiff has suffered no wrong and can obtain no damages. It is maintenance, but the justification or excuse is to be found in the righteousness of the suit, and the proof of its righteousness is its success (*x*). Lord Finlay held illogically (*y*): (1) that the success of the maintained litigation is not a bar to the right of action for maintenance, but (2) that the action will not lie in the absence of proof of special damage, whilst admitting that there is no such damage where a man is compelled to discharge his legal obligations. Since Lord Finlay had a casting vote upon each proposition, the law remains in that unsatisfactory and illogical position.

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(*w*) (1703), 2 Lord Raym. p. 955, *per* Holt, C.J. *Vide supra*, s. 33 (1). Winfield thinks that this view was correct: *Present Law*, pp. 81—88, 35 L. Q. R. 235.

(*x*) Holdsworth thinks that this is the proper view: *H. E. L.* viii, pp. 400—402.

(*y*) So Birkett, J., said in *Constantine v. London Imperial Hotels*, [1944] K. B. p. 702; 60 T. L. R. p. 512, that the two propositions were "in apparent conflict", for if the maintained litigation was just and succeeded and was not a bar to the action, the plaintiff could scarcely claim anything but nominal damages, yet the action for nominal damages will not lie.

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